



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2010

The Perils of Empowerment

Jane H. Aiken

Georgetown University Law Center, jha33@law.georgetown.edu

Katherine Goldwasser

Washington University School of Law

Georgetown Public Law and Legal Theory Research Paper No. 11-13

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/501>

<http://ssrn.com/abstract=1740728>

20 Cornell J.L. & Pub. Pol'y 139-180 (2010)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Family Law Commons](#), [Law and Gender Commons](#), and the [Law and Society Commons](#)

ARTICLE

THE PERILS OF EMPOWERMENT

Jane Aiken* and Katherine Goldwasser**

This Article examines bystander norms of disinterest and blame that inform and undermine strategies for dealing with significant social problems such as domestic violence. Current strategies rely on individual “empowerment” to reduce such violence. These strategies reflect fundamental misconceptions and false assumptions about the nature of domestic violence, about why this sort of violence persists so stubbornly, and, ultimately, about what it takes to change behavior that has long been tolerated, if not actually fostered, as a result of deeply imbedded social and cultural norms. The net effect is that far from empowering abused women, let alone reaching the norms that have made this form of abuse such an intractable problem, the so-called empowerment approach instead perpetuates the traditional view of domestic violence as a private matter, properly the business of no one except the two intimates themselves. Everyone else is a mere bystander. The responsibility for ending domestic violence is squarely placed in the hands of its (supposedly) now-empowered victims: it is up to each individual battered woman to end the violence against her; if she fails she has only herself to blame. Drawing on the literature on norms and the law, we analyze how successful norm-changing strategies in other contexts suggest a different and more effective approach to the problem of domestic violence. The conscious change of tactics in anti-smoking campaigns from a focus on protecting the smoker to a focus on protecting non-smokers has resulted in a surprisingly rapid change in cultural norms about smoking. Lessons drawn from that campaign suggest new strategies for coping with domestic violence. The Article concludes that given the financial and personal negative effects of domestic violence on third parties, norm changing strategies that rely, not on notions of individual empowerment and autonomy, but rather on strategies grounded in the idea that domestic violence is a community problem that affects us all, are far more likely to

* Professor of Law, Georgetown University Law Center.

** Professor of Law, Washington University School of Law. The Authors wish to thank Robin West, Deborah Epstein, Pauline Kim, Michael Seidman, David Luban, Michael Cedron, David Vladek, Heathcote Wales, Nancy Cantalupo, the Washington University Faculty Colloquium, and the Georgetown Law School Working Paper Series. Enormous thanks also go to our research assistants, Anna Carpenter, Eugene Marder, and Nahid Sorooshyari.

have an impact on reducing intimate violence. Such norm-changing strategies transform the bystander into an interested party.

INTRODUCTION.....	141
I. THE EMPOWERMENT APPROACH TO DOMESTIC VIOLENCE .	143
A. <i>Historical and Legal Backdrop</i>	143
B. <i>Ideological Roots</i>	149
II. PROBLEMS WITH THE EMPOWERMENT APPROACH.....	152
A. <i>False Assumptions</i>	152
B. <i>Ideology in Tension with Strategy</i>	168
III. CHANGING SOCIAL NORMS	170
CONCLUSION.....	180

The facts are all too familiar. This time they occurred in St. Louis, Missouri. Kelli Alexander, caught up in a contentious divorce initiated after years of abuse by her husband John, sought a court order to obtain protection from him. In her petition, she stated, “My husband has a very violent temper and has hit me, kicked me, pushed me, threatened me with a knife and threatened to kill me. I left with the children, and the consequences are going to be unimaginable.”¹ The court granted Kelli’s request and entered an order directing John to stay away from her except as needed to facilitate John’s court-ordered visitation with their three young children. Several weeks later, Kelli was to bring the children to an agreed-upon public place to make them available for a visit with John. She drove alone; her friend April Wheeler, with whom Kelli and the children were staying, had the Alexander children with her and followed behind. John waited along the road he knew his wife would be traveling. When he spotted her he emerged, rammed her car head-on with his own car, and approached on foot. Seeing what was happening, April pulled up, left the Alexander children in her car, and approached as well. With the Alexander children watching, John pulled a gun and shot and killed both women. He then sped away and was killed when he lost control of his car during a high-speed chase by police. The entire chain of events left three children orphaned and two others without their mother.²

In the aftermath of these events, a letter to the editor in the local paper decried that Kelli had done “everything right” to escape her husband’s abuse and yet still ended up dead.³ A letter in response “t[ook] issue with” that view, based on the fact that Kelli had failed to

¹ Michelle Munz, *Those Near Him Saw John Alexander’s Rage*, ST. LOUIS POST-DISPATCH, Mar. 3, 2005, at C1.

² William C. Lhotka, *Court Takes up Case of 3 Children*, ST. LOUIS POST-DISPATCH, Nov. 25, 2005, at A1.

³ Paul Milligan, Letter to the Editor, ST. LOUIS POST-DISPATCH, Mar. 6, 2005, at B2.

*take proper protective measures by availing herself of her right under state law to carry a concealed weapon.*⁴

*The system provide[d] for Kelli to protect herself and her children. She was over twenty-one with a clean record and legally could have had any gun she owned in the car with her when she was attacked. If she had used her right to self-defense, her friend would still be alive, and her children would still have their mother.*⁵

INTRODUCTION

Much has been written about the problem of domestic violence.⁶ A good deal of the scholarship has focused on legal remedies for the violence, with the aim of either improving the efficacy of existing remedies or proposing the adoption of new ones. The bulk of the remedies in use today came into existence in the 1970s. Developed with an understanding that domestic violence is at bottom an exercise of domination and control, these legal reforms focused on empowering battered women so that they could put their abusive relationships behind them and take charge of their own lives.⁷ This notion of “empowerment” as a means of addressing the problem of domestic violence is what prompted us to join the fray.

We have come to believe that, if the aim is to significantly reduce domestic violence, approaches that focus on empowering abused women are flawed in ways that render them not just ineffective, but actually counterproductive. Our thesis is that the use of such strategies reflects

⁴ See 38 MO. REV. STAT. § 571.030.3 (2009).

⁵ Marion Madden, Letter to the Editor, ST. LOUIS POST-DISPATCH, Mar. 8, 2005, at B6.

⁶ Throughout this Article, we use the term “domestic violence,” not in its generic (and gender-neutral) sense, but to refer to the physical, sexual, and/or psychological abuse of a woman by her male intimate partner. Similarly, we use the term “batterer” to refer to a man who engages in any form of domestic violence, including abuse that is purely psychological. Also on the subject of terminology, we are mindful that use of “victim” and “battered woman” in this context is not free from controversy. See, e.g., Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 530–31 (1992) (criticizing the term “victim” as a “problematic characterization” and the term “battered woman” as “a static, inaccurate account of the many life experiences of a woman who has been battered”). Nonetheless, we use these terms interchangeably to refer to a woman who has experienced domestic violence.

⁷ For historical accounts chronicling the development of legal remedies, see, for example, ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 7–8 (1987); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 29–32 (1982); Albert R. Roberts & Karel Kurst-Swanger, *Police Responses to Battered Women: Past, Present, and Future*, in *HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES: POLICIES, PROGRAMS AND LEGAL REMEDIES* 101, 102–04 (Albert R. Roberts ed., 2002); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657. For the perspective of an advocate during this period, see DEL MARTIN, *BATTERED WIVES* (rev. ed. 1981).

fundamental misconceptions and false assumptions about the nature of domestic violence, about why this sort of violence persists, notwithstanding the panoply of legal remedies designed to combat it, and, ultimately, about what it takes to change behavior that has long been tolerated, if not actually fostered, as a result of deeply imbedded social and cultural norms.

Part I of the Article describes the basics of what we call the empowerment approach, including its historical context,⁸ the thinking behind it,⁹ and the legal remedies it has spawned.¹⁰ Of particular interest to us, because of its centrality to the empowerment approach, is the civil order of protection, an order that can be issued at the behest of an abuse victim in which a court imposes legally binding restrictions on her batterer.

In Part II, we discuss two problems with the empowerment approach that, taken together, help explain why the remedies developed in connection with this approach have not come close to fulfilling the promise they initially seemed to hold. Subsection A of Part II examines certain misconceptions and false assumptions that underlie the remedies, the existence of which calls into question how well these remedies could ever reasonably be expected to work. Subsection B then addresses a problem that goes to the heart of the empowerment approach: the very changes that were ostensibly meant to empower battered women have instead paved the way for the state—indeed, for all of us—to put responsibility for ending domestic violence in the hands of its victims and avoid dealing with the problem ourselves. Although in some ways extreme, the letter to the editor quoted in the epigraph to this Article captures the prevailing view: it is up to each individual battered woman to end the violence against her; if she fails she has only herself to blame.

In Part III we offer some thoughts about the seeming intractability of the problem of domestic violence and about where to go from here. We think there is a link between our reliance on the empowerment approach and the persistence of the norms that have allowed this violence to flourish for so long. We are convinced that changing these norms calls for a different approach to the problem—one that relies, not on notions of individual empowerment or autonomy, but rather on strategies grounded in the idea that domestic violence is a community problem. These strategies range from social marketing campaigns designed to elicit concern about the social costs of tolerating woman battering to approaches that treat domestic violence as a public health or similar community-wide problem calling for community-wide preventive efforts in response. The common denominator is that they all embrace the idea

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B.

¹⁰ See *infra* Part I.A.

that domestic violence is not a problem between individuals, affecting only them, and for which they, alone, are responsible, but as a problem that affects us all.

I. THE EMPOWERMENT APPROACH TO DOMESTIC VIOLENCE

A. *Historical and Legal Backdrop*

Violence against women by their male partners is a major social problem throughout the world.¹¹ In this country, as elsewhere, determining the extent of the problem is difficult because it generally occurs in private and often goes unreported.¹² Still, estimates abound. According to the U.S. Department of Justice, intimate partners commit 4.8 million physical assaults and rapes against women in the United States each year.¹³ This translates into roughly one woman being battered every seven seconds. It is estimated that one of every four American women will be physically or sexually abused by an intimate during her lifetime.¹⁴

Placed in historical perspective, the idea that domestic violence is anything other than a purely private matter, let alone a serious social problem, is a relatively recent phenomenon.¹⁵ From the time of the first colonists until the 1960s, with but a few exceptions, inattention to do-

¹¹ WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 89 (Etienne G. Krug et al. eds., 2002), available at http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf.

¹² *Id.* at 92; see also PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (2000), available at www.ojp.usdoj.gov/nij/pubs-sum/181867.htm; Ronet Bachman, *Incidence Rates of Violence Against Women: A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-Partner Violence Against Women from the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)*, 6 VIOLENCE AGAINST WOMEN 839 (2000).

¹³ NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES (2003), available at www.cdc.gov/ncipc/pub-res/ipv_cost/ipv.htm [hereinafter COSTS OF INTIMATE PARTNER VIOLENCE]. As evident from the estimates, there was no attempt in the study to count abuse that was strictly psychological and/or emotional. *Id.*

¹⁴ TJADEN & THOENNES, *supra* note 12, at iii. Other studies have arrived at similar figures. See, e.g., KAREN SCOTT COLLINS ET AL., HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN'S HEALTH (1999), available at http://www.commonwealthfund.org/usr_doc/Healthconcerns__surveyreport.pdf.

¹⁵ See generally LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE (2008); PLECK, *supra* note 7. While accounts vary as to the extent to which the law actually approved physical chastisement of women, see, for example, Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2125 n.25 (1996) (collecting cases). It is generally agreed that even after such conduct was criminalized in all jurisdictions, it still was largely ignored, SCHECHTER, *supra* note 7, at 12-20.

mestic violence was the order of the day.¹⁶ The rare occasions when the issue received attention were invariably followed by periods of retrenchment, usually marked by an upsurge in talk about the family, family life, and the importance of guarding against any outside interference, above all by the state, into family privacy.¹⁷ The resolve to protect the family in this way was based on the idea that the public world was hard, calculating, and business-like, and the world of the family, or private sphere, was loving, caring, and uniquely personal.¹⁸ This demarcation between public and private spheres made addressing domestic abuse especially difficult.

In the late 1960s, feminist activists began to call attention to the problem of intimate violence.¹⁹ They asserted that the right of women to control their own bodies and lives was both fundamental and non-negotiable. This belief formed the basis for the work of the battered women's movement.²⁰ Movement advocates challenged the long-standing treatment of woman abuse as a private, family matter contending that such treatment was symptomatic of a patriarchal society in which women were consistently devalued.²¹ These advocates pushed for a wholesale change in society's response to domestic violence involving the creation of new non-patriarchal norms for intimate partner relationships,²² social and economic equality for women in every area of their lives, safe and affordable housing, childcare, and other services for battered women who left their batterers, and, importantly, legal reform that would enable these women to make use of the panoply of available support services and take control of their lives.²³ Much of this was framed in the rhetoric of "the personal is political,"²⁴ an expression of the view that women's individual experiences are to a great extent the product, not of personal choice, but rather of limitations imposed on them from without by a system of male domination and control.²⁵ Under this view, any attempt to

¹⁶ PLECK, *supra* note 7, at 4–6. One exception involved the Puritans of Massachusetts Bay and Plymouth colonies; the other spanned a period from the mid-1870s until about 1890. *Id.* at 4.

¹⁷ *Id.* at 6–7.

¹⁸ *Id.* at 8–9.

¹⁹ LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 1–2 (Univ. of Ill. Press 2002) (1988).

²⁰ SCHECHTER, *supra* note 7, at 29–30.

²¹ G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 274–76 (2005).

²² MARTIN, *supra* note 7, at 188.

²³ KRISTIN A. KELLY, *DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY* 55 (2003).

²⁴ Carol Hanisch, *The Personal is Political*, in *FEMINIST REVOLUTION: REDSTOCKINGS OF THE WOMEN'S LIBERATION MOVEMENT* 204–05 (Kathie Sarachild ed., Random House 1978) (1975).

²⁵ In the essay, Hanisch takes issue with the view that women's groups of the 1960s were a form of "therapy" for "personal problems" and states: "One of the first things we discover in

compartmentalize women's lives into separate public and private spheres only served to reinforce male control within the family.²⁶ It was time that the abuse of women emerge from behind the veil of family privacy and be recognized for what it really was: a tool for the control of women.

Legal reform was viewed as an important component of the effort to secure real relief for the millions of women experiencing domestic violence.²⁷ The physical abuse perpetrated against these women was, to be sure, prosecutable criminal conduct everywhere.²⁸ Yet, police and prosecutors had been slow to act, treating woman abuse as domestic squabbles of little importance or worse, as an unobjectionable method of control within the family.²⁹ Women needed a way to protect themselves and their children from their batterers, they needed an easy way to signal police on the scene to ask them to intervene, and they needed provision for support of children once the batterer was removed. They needed this

these groups is that personal problems are political problems. There are no personal solutions at this time. There is only collective action for a collective solution." *Id.* at 204.

²⁶ *Id.*

²⁷ KELLY, *supra* note 23, at 68.

²⁸ *Id.* at 88. This was not so, of course, of the psychological and emotional abuse, which could be every bit as disabling. See Ann L. Coker et al., *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*, 9 ARCHIVES FAM. MED. 451 (2000); Erin S. Straight et al., *The Impact of Partner Psychological Abuse on Health Behaviors and Health Status in College Women*, 18 J. INTERPERSONAL VIOLENCE 1035 (2003). For many years, in many jurisdictions laws commonly exempted forcible sexual intercourse by a man with his wife from the definition of rape. NEAL MILLER, INST. FOR LAW & JUSTICE, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS 8 (2004), available at http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf.

²⁹ MARTIN, *supra* note 7, at 93; Sack, *supra* note 7, 163–65. Del Martin provides the following telling example from a Michigan police training manual on how to handle domestic violence calls:

- a. Avoid arrest if possible. Appeal to their vanity.
- b. Explain the procedure of obtaining a warrant.
 - (1) Complainant must sign complaint.
 - (2) Must appear in court.
 - (3) Consider loss of time.
 - (4) Cost of court.
- c. State that your only interest is to prevent a breach of the peace.
- d. Explain that attitudes usually change by court time.
- e. Recommend a postponement.
 - (1) Court not in session.
 - (2) No judge available.
- f. Don't be too harsh or critical.

MARTIN, *supra* note 7, at 94. Some police departments observed informal stitch rules: a wife who was abused had to require a certain number of surgical sutures before a husband could be arrested for assault and battery. Richard Gelles, *Public Policy for Violence Against Women: 30 Years of Successes and Remaining Challenges*, 19 AM. J. PREVENTIVE MED. 298, 298 (2000); see also Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1852–53 (2001) (suggesting that the police role in domestic violence situations is often more one of a peacemaker than a law enforcer).

relief quickly and without cost. Enactment of new laws and enforcement of existing laws could serve those functions, while also communicating clearly that in this society, woman abuse was not a private, relationship issue, but a matter of great public importance and concern.

During the 1970s, a number of states enacted legislation designed to address these needs.³⁰ Under the new legislation, the remedy of choice for battered women was a form of victim-initiated and court-issued restraining order variously referred to as a “civil protection order” (CPO), an “order of protection” (OP), or similar names.³¹ At the start of the decade, only the District of Columbia and New York provided for such a remedy.³² In 1976, Pennsylvania joined in with its Protection from Abuse Act.³³ Within a short time, well over half the states had adopted new legislation that included this sort of remedy.³⁴ By the mid-1990s, all jurisdictions had such legislation, and that remains true today.³⁵

While the particulars vary, all protective order statutory schemes have certain features in common.³⁶ The remedy is “victim-initiated” and civil in nature.³⁷ The victim-initiated aspect means that no one except the victim herself is entitled to seek a protection order—not a child in the home or other family member or friend, and not any state or government official such as a social service worker or the police. It is the woman’s remedy to invoke or not as she sees fit. The civil nature of the remedy means that even if the showing made by the woman establishes that her abuser has engaged in criminal conduct, no jail sentence or even a conviction will result.³⁸ But the civil nature of the proceeding also means that proof by a preponderance of the evidence, as opposed to the criminal standard of beyond a reasonable doubt, is all that is required.³⁹ Upon such a showing, a full order of protection is granted.⁴⁰

³⁰ Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of “Efficacy,”* 11 S. CAL. INTERDISC. L.J. 361, 362 (2002).

³¹ KELLY, *supra* note 23, at 74.

³² Janice L. Grau, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, 703–04 & n.5 (1982).

³³ *Id.* at 704; see Protection from Abuse Act, 35 PA. CONS. STAT. §§ 10181–10190 (repealed 1990).

³⁴ See Grau, *supra* note 32, at 704.

³⁵ Ko, *supra* note 30, at 362.

³⁶ For a comprehensive analysis of all the statutes dealing with orders of protection, see Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009).

³⁷ *Id.* at 1111–12.

³⁸ See Roberts & Kurst-Swanger, *supra* note 7, at 130. Of course if the violence rises to the level that it attracts the attention of a prosecutor, it can give rise to a criminal prosecution. As with the bringing of any other criminal charge, however, this is solely within the discretion of the prosecuting authority. *Id.* at 132.

³⁹ See *id.* at 131.

⁴⁰ See *id.*

In most states, the court has the power to grant a stay away order for up to three years.⁴¹ In some states, the order is renewable for a period of time without a new showing of abuse.⁴² The court can also grant possession of the residence to the victim, grant custody and visitation, order the payment of child support and maintenance if appropriate, compensate the victim for damages caused by the respondent including reimbursing service providers, require the batterer to participate in batterer's intervention or substance abuse treatment programs, and prevent the respondent from possessing or purchasing firearms.⁴³ If the respondent comes near the petitioner, he can be arrested for violating the order and, in most jurisdictions, be charged with a misdemeanor.⁴⁴ In the event of multiple misdemeanor convictions for such violations, a felony charge may follow.⁴⁵

Orders of protection were frequently described as an intervention designed to empower victims of domestic violence.⁴⁶ The ability to have the legal system intervene in the battering relationship was designed to even the odds in order to counteract the gross power discrepancies that most women in battering relationships experienced.⁴⁷ Furthermore, being empowered to be the initiator of the action gave the victim her "voice" again, a voice that may have been silenced by the dynamics of the battering relationship.⁴⁸ Thus, orders of protection not only were designed to provide physical safety, they were also thought to assist a victim in her psychological recovery.⁴⁹

Although generally regarded as the centerpiece of the new domestic violence legislation, victim-initiated civil protective orders were not the only legal reform. A number of states took steps designed to change the

⁴¹ Catherine F. Klein & Leslye E. Orloff, *Civil Protection Orders*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK* 200 (Deborah M. Goelman et al. eds., 1996).

⁴² *Id.* at 200.

⁴³ *Id.* at 202–06.

⁴⁴ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *HOFSTRA L. REV.* 801, 897–99 (1993).

⁴⁵ *Id.*

⁴⁶ Ko, *supra* note 30, at 369.

⁴⁷ KELLY, *supra* note 23, at 74–75.

⁴⁸ Ko, *supra* note 30, at 369.

⁴⁹ *Id.* To complement this assistance, domestic violence advocates secured increased shelter for women and children fleeing abuse, initiated counseling programs designed for battered women and their children, prompted police to train officers about domestic violence, and urged prosecutors and police officers to have victim service workers who were dedicated to victims of domestic abuse. The psychological benefit may be overstated. As Nina Tarr notes, "The legal systems and policies that impose the 'one size fits all' approach do women a psychological disservice by either forcing them to get an Order of Protection, punishing them for failing to do so, or denying them a voice and recognition if they fail to comport with the current agenda." Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 *WASH. U. J.L. & POL'Y* 157, 159 (2003).

way their criminal justice systems dealt with such violence as well.⁵⁰ Some enacted mandatory arrest laws limiting traditional law enforcement discretion and requiring police to make an arrest in domestic violence cases whenever there was probable cause.⁵¹ Several prosecutors' offices went even further and instituted no-drop prosecution policies, requiring that criminal domestic violence cases go forward regardless of the victim's wishes.⁵² Unlike civil protective orders, these criminal remedies put primary reliance on state law enforcement officials, rather than the victim herself.⁵³ Not surprisingly, many proponents of the empowerment approach opposed the remedies, particularly the no-drop policies, on precisely those grounds.⁵⁴ But other criminal law reforms fit comfortably within the empowerment model. For example, laws limiting, if not completely repealing, the spousal exception to the crime of rape,⁵⁵ the expansion of police arrest authority so as to permit warrantless arrests for misdemeanor domestic violence offenses,⁵⁶ the enactment of measures designed to ensure domestic violence training and education for police

⁵⁰ Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough?*, 1996 U. ILL. L. REV. 533, 537.

⁵¹ *Id.* at 534. By 1996, at least fifteen states and Washington, D.C. had adopted some version of mandatory arrest legislation. *Id.* But see *Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005) (holding that the plaintiff had no personal entitlement under the Fourteenth Amendment Due Process Clause to police enforcement of her restraining order against her husband based on Colorado's mandatory arrest law). Notwithstanding the Colorado legislature's repeated use of the word "shall" in describing the duties of a police officer under the statute, see, for example, *id.* at 758–59 (quoting portions of the statute), according to the Court, "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory," *id.* at 760.

⁵² See Ava Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 760 (2007). These no-drop policies were a reflection of a counter-trend in feminist understanding of domestic violence. At the same time as remedies for domestic violence were being constructed to empower victims, some experts, led by psychologist Lenore Walker, were beginning to paint a picture of abuse victims by drawing on a theory known as "learned helplessness." See LENORE E. WALKER, *THE BATTERED WOMAN* 42–54 (1979). Under this theory, Walker hypothesized that women who experience sustained violence in intimate relationships sometimes stayed in those relationships, not because they truly wanted to, but because they had been stripped of the will to leave. See *id.* To counteract this "learned helplessness," police and prosecutorial strategies increasingly took decisions out of the hands of the domestic violence victim on the theory that the state knew better than she did what was best for her. Cf. Gruber, *supra* at 747–51 (critiquing various domestic violence law reforms, including no-drop prosecution policies, for "treat[ing] victims with increasing amounts of paternalism and disdain" and for seemingly being premised on "the belief that female victims are weak, damaged, and unable to recognize their own interests").

⁵³ See, e.g., Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 961 (1999).

⁵⁴ See, e.g., Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

⁵⁵ MILLER, *supra* note 28, at 8–10.

⁵⁶ *Id.* at 6.

and prosecutors,⁵⁷ and the adoption of anti-stalking laws all comfortably fit within the empowerment model.⁵⁸

B. Ideological Roots

Although the battered women's movement focused first and foremost on ending domestic violence, movement advocates had a far broader sense of their overall mission. Again, they saw battering as a tool used to devalue women and enforce male domination and control.⁵⁹ Consistent with this view, they were committed to working to change the social and cultural norms that put power in the hands of men at the expense of women. This meant both challenging patriarchy's subordination of women to men and empowering women to take control of their own bodies and lives.⁶⁰ In the domestic violence context, it also meant contending with the widely held view, rooted in classical liberal theory's notion of the strict separation between public and private life, that such violence was a private matter, not the business of anyone except the two people involved. In keeping with this view, battered women had long been conditioned to remain silent about what they were experiencing at home. Battered women's advocates viewed the public/private dichotomy as both wrong—the oft-repeated phrase, “the personal is political,” was an expression of that view—and a powerful contributor to women's oppression.⁶¹ They were convinced that to make any real headway against the problem of domestic violence, it was essential to dismantle this false dichotomy and recast the problem as one of public importance and concern.⁶²

Most movement advocates expected little help or support from the state. The state, after all, was responsible for insulating this ostensibly private violence through nonintervention.⁶³ The law's blindness to the violence inflicted on women in their homes seemed to signal that such behavior was acceptable. Instead of providing some measure of protection, as it routinely did with victims of other forms of violence by one individual against another, the state had simply abandoned women to

⁵⁷ *Id.* at 6–7.

⁵⁸ *Id.* at 22–23.

⁵⁹ See GOODMAN & EPSTEIN, *supra* note 15, at 34.

⁶⁰ *Id.*

⁶¹ See KELLY, *supra* note 23, at 32–35.

⁶² *Id.*; see also Milton C. Regan, Jr., *Getting Our Stories Straight: Narrative Autonomy and Feminist Commitments*, 72 IND. L.J. 449, 449 (1997).

⁶³ KELLY, *supra* note 23, at 68; see also ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 182 (2000) (“Many in th[e battered women's] movement were skeptical of an affirmative role for the state; they saw the state as maintaining, enforcing, and legitimizing male control over women, not remedying it; they rejected the idea that battered women activists ought to trust the state, expect much from the state, or engage with the state in any way.”).

face this violence on their own.⁶⁴ In the view of these advocates, the law had proved itself to be nothing more than a tool in the service of the state and a vehicle for women's subjugation.⁶⁵ Thus, instead of looking immediately to the legal system, they initially sought to address the problem in other ways. One common tack was the establishment of local and individually autonomous centers, shelters, and programs all aimed at improving the lives of battered women.⁶⁶ A distinct ideology that emphasized victim control and self-help above all else informed how these entities and programs dealt with the women who came seeking assistance.⁶⁷

With little to no public funding for shelters or services, women looked to each other for the political, economic, emotional, and social support that many believed only women could provide.⁶⁸ Women's groups largely funded shelters, and individual women opened their homes to women fleeing domestic violence.⁶⁹ Advocates chose governance models that celebrated women's agency and endorsed non-hierarchical methods of operation that featured decision-making by consensus.⁷⁰ They believed that one had to live the way one wanted the world to be. It was through this living that change would occur. They thought that by living non-hierarchically and imbuing women with their own agency and autonomy—in short, empowering them—they could create the cultural changes that were necessary to undermine society's patriarchal structure.⁷¹

Notwithstanding their general mistrust of the legal system, many activists saw advocating for domestic violence law reform as an essential part of their work. They saw recognition in the law as a way of accomplishing multiple objectives at once including bringing domestic violence into the national spotlight, conveying a message of support to victims, and making clear that battering was simply unacceptable. They also believed that legislation would advance the larger project of transforming the culture from one that viewed domestic violence as strictly private to one that instead recognized it to be a national social problem of enormous dimensions.⁷² As activist pioneer Del Martin explained, “‘You can’t legislate attitudes’ is a truism in political circles. But I disagree; I

⁶⁴ KELLY, *supra* note 23, at 69.

⁶⁵ Miccio, *supra* note 21, at 252.

⁶⁶ *Id.* at 256–57.

⁶⁷ *Id.* at 257–61.

⁶⁸ *Id.*

⁶⁹ *Id.* at 258.

⁷⁰ SCHECTER, *supra* note 7, at 64. Even though such models were often difficult to manage, many advocates noted that it was better to place power in women's hands rather than have a top-down efficient arrangement. *See id.*

⁷¹ *Id.*

⁷² KELLY, *supra* note 23, at 68.

think that legislation very often effects changes in public attitudes over time.”⁷³

Many of the activists who favored legislation saw the civil order of protection as the most attractive remedy because it put in the hands of victims the ability to take control and chart their own course.⁷⁴ Unlike with the criminal law, no longer would a battered woman need to rely on the police or any other patriarchal figure to save her.⁷⁵ In short, the civil remedy empowered her. It was the woman, and the woman alone, who decided if and when to act. This, in their view, was the essence of autonomy.

Two additional points about movement ideology and empowerment-based legislation bear emphasis. First, the ideal of autonomy that animated the movement differed from the traditional liberal notion of autonomy.⁷⁶ The fact that activists saw battering as linked with patriarchy meant that, from their perspective, male violence against women was a concern for all women, not just those who experienced it first-hand.⁷⁷ This, in turn, informed their conception of autonomy in the context of domestic violence. Unlike liberalism’s disconnected, atomistic version, the feminist version featured a strong sense of the connectedness of all women because of their common experience of living in a society that subordinated them to men.⁷⁸

The other point worth noting here is that the reformers who advocated for the empowerment approach did not believe that law alone would accomplish all that needed to be done.⁷⁹ Their conception of empowerment went far beyond court access. Instead, they saw the effort as multi-faceted, requiring, among other things, programs offering a wide range of accessible services to support women leaving abusive relationships and, ultimately, changes in the structure of male-female intimate relationships to ensure gender equality.⁸⁰ The hope was that providing victims with a vehicle for self-help and restraining batterers would play a part in this larger effort and help begin to counter the centuries of condi-

⁷³ MARTIN, *supra* note 7, at 175.

⁷⁴ Ruth Lewis et al., *Law’s Progressive Potential: The Value of Engagement with the Law for Domestic Violence*, 10 SOC. & LEGAL STUD. 105, 107 (2001).

⁷⁵ See Gruber, *supra* note 52, at 760.

⁷⁶ See, e.g., JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE’S POLITICAL THOUGHT 40 (2002) (“Locke’s position on the natural subjection of wives is an embarrassment for his general theory of equality.”); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 387 (1996) (discussing the “ideal of autonomy” in comprehensive and political liberalism).

⁷⁷ See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999).

⁷⁸ *Id.*

⁷⁹ See GOODMAN & EPSTEIN, *supra* note 15, at 38.

⁸⁰ See *id.* at 31–38.

tioning and attendant social and cultural norms and values that had tolerated battering for so long.⁸¹

II. PROBLEMS WITH THE EMPOWERMENT APPROACH⁸²

No doubt a civil order of protection can be helpful to a woman trying to free herself from a battering relationship. Indeed, the mere knowledge that such a remedy exists can be a source of support. But the remedy does not exist today in a vacuum; rather, it is the centerpiece of an overall strategy to reduce domestic violence by empowering battered women. This overall strategy—the empowerment approach—is what concerns us. We believe it actually undermines efforts to reduce violence against women. In this Part, we discuss two serious problems with the empowerment approach. First, it is based on a set of beliefs that reflect assumptions about the dynamics of intimate violence that range from shaky to just plain wrong. Second, the approach is rooted in an ideology that recognizes the need for—indeed, demands—widespread social change, but is ill-designed to bring it about.

A. *False Assumptions*

One obvious assumption behind the idea of empowering battered women by giving them access to an appropriate legal remedy such as a civil order of protection is that these orders will work as intended by providing some measure of (if not complete) protection to the abused women who obtain them. For that to happen, however, batterers would have to obey the orders. Although in most instances it may be reasonable to assume that people will comply with court orders against them, that is not the case where batterers are concerned.

For some people, obeying a court order is simply a matter of following rules: the fact that a court has ordered them to (or not to) do something is reason enough to comply. Batterers, however, are not rule-followers. To think that men who are found to have physically, sexually, and/or psychologically abused their intimate partners (such a finding generally being the basis for the issuance of an order of protection in the first instance) will just “cease and desist” if ordered to do so by a court is simply unrealistic. Indeed, merely to articulate this idea is to show how ludicrous it is.⁸³

⁸¹ *Id.* at 33.

⁸² Consistent with the aim of our Article, the discussion in this section focuses on the false assumptions that tie in most directly with the empowerment approach. For a discussion of various other false assumptions not addressed here, see Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS. U. PUB. L. REV. 7, 19–22, 36, 44 (2004).

⁸³ Victims seem to be aware of this disconnect. In one study, fewer than half of victims who received a protection order reported that they thought the man believed that he had to

Of course, rule-following, for its own sake, is not the only reason someone might obey a court order; concern about the possible consequences of noncompliance can also be a motivator. This is in keeping with basic deterrence theory: the idea that people who might otherwise violate a rule or law may decide to comply instead because they fear apprehension and punishment if they disobey.⁸⁴ Putting to one side the question whether deterrence theory assumes greater rationality than is true of most batterers,⁸⁵ the notion of possible deterrence assumes the existence of real consequences for violations.⁸⁶

As applied to batterers and violations of protective orders, the “real consequences for violations” assumption depends in turn for its validity on the further assumption that the police, prosecutors, and judges who play a part in the enforcement of these orders would at least observe, if not wholly embrace, the new legal regime. That assumption has unfortunately proved to be unfounded.⁸⁷ Although vastly improved in the time since protective order legislation was first adopted, police enforcement of protective orders is still uneven at best.⁸⁸ Studies of police handling of domestic violence incidents have generally found relatively low arrest

obey the order. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 218, 221–22 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

⁸⁴ See Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1212 (2007) (“What matters to deterrence is . . . the expected penalty, and the incentives that penalty creates for future conduct.”).

⁸⁵ Any such assumption about batterers has been recognized as debatable at best. See, e.g., JEFFREY FAGAN, U.S. DEP’T OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 30 (1996) (“[D]eterrence logic . . . assumes a rational offender-actor who weighs the costs of offending—costs associated both with the act itself and the legal actions that ensue—against whatever benefits that may accrue from the behavior. . . . Th[is] logic . . . is compromised among batterers whose behavior is patterned over time and for whom rational calculations are not possible during the arousal of a violent assault.” (citations omitted)).

⁸⁶ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425 (1999) (“[D]eterrence theory focuses on consequences.”).

⁸⁷ One study of the civil protection order process called enforcement “the Achilles’ heel of the civil protection order process, because an order without enforcement at best offers scant protection and at worst increases the victim’s danger by creating a false sense of security. Offenders may routinely violate orders, if they believe there is no real risk of being arrested.” PETER FINN & SARAH COLSON, U.S. DEP’T OF JUSTICE, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT* 49 (1990); see also Klein & Orloff, *supra* note 44, at 813 (“Unfortunately, widespread enforcement of civil protection orders is lacking.”).

⁸⁸ For a discussion of some of the improvements, see Sack, *supra* note 7, at 1669–71. This is by contrast with the early days of protection order legislation, when the idea that domestic violence was a private, family matter was still prevalent among police policymakers and line officers, and police practices reflected that view. *Id.* at 1662–63. For more on the unevenness problem, see also *infra* notes 89–91 and accompanying text.

rates for protective order violations.⁸⁹ Even in the states that have recognized and responded to this unevenness by enacting mandatory arrest requirements for these violations, arrests are not always made.⁹⁰ One study in a mandatory arrest state actually found an inverse relationship between the two: when police officers were called to the scene of a domestic violence incident, in cases in which there was a violation of an existing order of protection, police were less likely to make an arrest.⁹¹

Generally, prosecutors make the decision to bring a criminal charge for violating an order of protection. Yet prosecutors are sometimes reluctant to put significant resources into pursuing these prosecutions.⁹² In some instances, the reluctance is due to the victim's unwillingness to cooperate.⁹³ The fact that violation-of-order-of-protection offenses tend

⁸⁹ See WOMEN'S RIGHTS PROJECT, ACLU, DOMESTIC VIOLENCE: PROTECTIVE ORDERS AND THE ROLE OF POLICE ENFORCEMENT (2007), available at <http://www.aclu.org/files/pdfs/womensrights/062007protectiveorders.pdf> ("[S]tudies show that often police do not make domestic violence arrests, even in states with laws that require an arrest when there is reasonable cause to believe a protective order has been violated. Nationally, one study found domestic violence assailants were arrested or detained by the police less than half the time - in 47 percent of rape cases, 36 percent of physical assault cases and 28 percent of stalking cases. Another study found that only 20 percent of domestic violence cases resulted in the police arresting the assailant." (citation omitted)).

⁹⁰ See David Eitle, *The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases*, 51 CRIME & DELINQ. 573, 590-91 (2005) (discussing results of study comparing likelihood of arrest in domestic violence cases in jurisdictions with mandatory arrest policies and jurisdictions without such policies, and noting that even in jurisdictions that had such policies, the likelihood of arrest was "still only 50%," which was just a 5% increase over the 45% likelihood found in jurisdictions without mandatory policies.) Earlier studies reported similar results. See, e.g., Robert J. Kane, *Patterns of Arrest in Domestic Violence Encounters: Identifying a Police Decision-Making Model*, 27 J. CRIM. JUST. 65 (1999) (finding that arrests of protective order violators in two police districts in Massachusetts, a mandatory arrest state, were made less than half the time).

⁹¹ Robert J. Kane, *Police Responses to Restraining Orders in Domestic Violence Incidents: Identifying the Custody-Threshold Thesis*, 27 CRIM. JUST. & BEHAV. 561, 572 (2000). This is not to suggest that arrests are common in cases in which police are called to the scene of domestic violence but there is no protective order. To the contrary, police sometimes handle those situations by simply telling the woman to go to court and file for an order of protection. Failure to do so, they say, suggests that she is not serious about ending the abuse.

⁹² Wanless, *supra* note 50, at 566-67.

⁹³ *Id.* at 567. As noted previously, some jurisdictions have responded to the problem of an unwilling victim by instituting policies that permit a prosecution to go forward irrespective of the victim's wishes. See Gruber, *supra* note 52, at 760; see also Mills, *supra* note 54, at 561; Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 327-28 (2005). These policies have sparked considerable controversy among battered women's advocates. Some advocates contend that the policies are themselves abusive of domestic violence victims. See, e.g., *id.* at 555 (stating that the policies "do violence to battered women"). Others believe that notwithstanding the interference with autonomy, pursuit of such policies is necessary to protect the public good. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1870 (1996) (stating that "[i]n the domestic violence context, the goal [of the criminal justice system] is to punish the

to be misdemeanors that, upon conviction, result in little if any jail time⁹⁴ may also play a part. Ironically, this can pose somewhat of a Catch-22: in many jurisdictions, felony charges and prison time might actually be possible in these cases, but only after the offender has first been convicted of prior misdemeanor violations of the protection order.⁹⁵ Whatever the reasons for it, the failure to bring charges in these cases can be quite glaring. One study of the phenomenon began with a group of 663 restrained batterers and found that about one-third (34%) were arrested for re-abuse and violation of the protection order against them within the next two years.⁹⁶ Although arrested re-abusers who have violated orders of protection might be viewed as good candidates for prosecution, the study found that almost one-third (33%) of the cases against these men were dismissed outright and another 10% were diverted without a finding of guilt.⁹⁷

Police and prosecutors aside, the “real consequences for violations of protective orders” assumption also rests on the notion that when a court order is violated, if nothing else, the court that issued the order will take action. It is true, of course, that an order of protection is a court order, a violation of which can constitute contempt of court. In theory, the violation may be addressed as either a criminal or a civil contempt.⁹⁸ In reality, however, the criminal contempt route contains a number of obstacles, while civil contempt is wholly unworkable. With criminal contempt, the difficulty lies in the fact that the proceedings generally call for the involvement of a prosecutor and, being criminal in nature, are

batterer in order to protect potential victims,” reasoning that ignoring a particular victim’s wishes may therefore be “necessary to protect women overall”). However, the Supreme Court’s new Confrontation Clause jurisprudence as articulated in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) has forced prosecutors to modify, but not wholly abandon, these policies; so their use—and the resulting controversy—will likely continue.

⁹⁴ See OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, LEGAL SERIES BULLETIN NO. 4: ENFORCEMENT OF PROTECTIVE ORDERS 2 (2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf> (“[T]he [protective order] violator may be charged with a felony, a misdemeanor, or contempt of court; however, in most states, felony treatment is reserved for repeat violations or aggravated offenses.” (citations omitted)).

⁹⁵ See *id.*

⁹⁶ Andrew R. Klein, *Re-abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don’t Work*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 192 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

⁹⁷ *Id.*

⁹⁸ Although both involve disobeying or disrespecting a court, civil and criminal contempt are quite different. The basic difference lies in the purpose of the sanction once the contempt is found. In the words of the Supreme Court, “a contempt sanction is considered civil if it ‘is remedial and for the benefit of the complainant.’” *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827–28 (1994) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441(1911)). By contrast, “‘it is criminal . . . [if it] is punitive, to vindicate the authority of the court.’” *Id.* at 828.

subject to due process requirements that tend to make them both more complicated and more time-consuming than other order of protection-related proceedings.⁹⁹ With civil contempt, the nature of the proceedings themselves is the problem. Unlike its criminal counterpart, civil contempt is designed, not to punish, but to create incentives on the part of the offender to comply with the order; as they say, he “‘carries the keys of his prison in his own pocket.’”¹⁰⁰ As such, civil contempt can be useful as a means of coercing “affirmative act[s].”¹⁰¹ Putting a batterer in jail until he pays the child support included in a protective order, for example, is a good candidate for the use of civil contempt. However, the coercive power of jail cannot be used to force someone *not to do* something, such as to force a batterer to stop battering. Civil contempt is thus ineffective as an enforcement mechanism against the violence.

Judges have also sometimes been reluctant to do their part in the enforcement scheme where violations of orders of protection are concerned. Although resistance has not been as widespread as with police and prosecutors, there remain some significant issues. For example, under the Violence Against Women Act (VAWA), it is a federal crime for a person who is subject to a protective order obtained by an intimate partner, and who meets certain other criteria, to possess a firearm.¹⁰² Yet, judges do not routinely inquire about firearms possession when issuing such orders.¹⁰³ In part, the failure to routinely inquire may be attrib-

⁹⁹ The need for a prosecutor would arise because the contempt would be “indirect” in the sense that the violation would have occurred outside the presence of the court and hence, unlike with direct contempt, could not be punished summarily. See *Bagwell*, 512 U.S. at 827 n.2 (describing “indirect contempts” as “those occurring out of court,” and noting that only “[d]irect contempts,” or those “that occur in the court’s presence[,] may be immediately adjudged and sanctioned summarily”). Various due process requirements such as the right to counsel, right to a jury trial, and requirement that guilt be proved beyond a reasonable doubt would apply because, as the Supreme Court has emphasized, “[c]riminal contempt is a crime in the ordinary sense,” *id.* at 826 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)), and “criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,” *id.* at 826 (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)).

¹⁰⁰ *Gompers*, 221 U.S. at 442 (quoting *In re Nevitt*, 117 F. 448, 451 (8th Cir. 1902)).

¹⁰¹ *Bagwell*, 512 U.S. at 828 (“[With civil contempt,] the contemnor is able to purge the contempt and obtain his release by committing an affirmative act . . .”).

¹⁰² 18 U.S.C. § 922(g)(8) (2000). Under the legislation, conviction “in any court of a misdemeanor crime of domestic violence” has the same effect. 18 U.S.C. § 922(g)(9).

¹⁰³ See Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CTR. FOR FAM., CHILD. & CTS. 3, 22 (2005). At least one jurisdiction has taken note of this problem and is attempting to address it. See NEW HAMPSHIRE ADMINISTRATIVE OFFICE OF THE COURTS, CRIMINAL DOMESTIC VIOLENCE CASES IN NEW HAMPSHIRE COURTS (2005) (noting the VAWA prohibition, determining that New Hampshire District Courts had ordered just 39% of criminal domestic violence to refrain from possessing firearms during the three-year study period, calling the figure “lower than expected,” and recommending for the future “[i]ncreased adherence to federal firearms laws”).

utable to shortcomings in the applicable federal and state legislation,¹⁰⁴ but there also has been definite reluctance (or worse) on the part of some judges.¹⁰⁵

More commonly, judges appear to be trying to perform their assigned role with orders of protection, but even then, false assumptions can get in the way. This happens, for example, whenever a judge includes in an order of protection a requirement that the batterer participate in a batterer's intervention, anger management, or similar program. The underlying assumption, of course, is that such interventions work; however, that optimism is not well-founded. Recent studies of batterer's intervention programs indicate that such programs do not reduce future abuse or change batterers' attitudes about violence against women.¹⁰⁶ Even organizations that provide these programs acknowledge their shortcomings.¹⁰⁷ One expert, testifying in Congress at a hearing on proposed legislation calling for federal funding of these and similar programs, explained the underlying misconceptions about the potential value of such programs this way:

¹⁰⁴ See Jennifer L. Vainik, *Kiss, Kiss, Bang, Bang: How Current Approaches to Guns and Domestic Violence Fail to Save Women's Lives*, 91 MINN. L. REV. 1113, 1128–31 (2007).

¹⁰⁵ See Sack, *supra* note 103, at 8 (“Substantial anecdotal evidence suggests that some judges are attempting to evade the federal law or are directly refusing to comply with it Commentators have speculated that this . . . may sometimes be due to judges' personal beliefs in the right to own guns and their reluctance to limit such access to respondents.”).

¹⁰⁶ NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, DO BATTERER INTERVENTION PROGRAMS WORK? TWO STUDIES 4 (2003). See generally Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. INTERPERSONAL VIOLENCE 448, 448–54 (2005) (reviewing results of various recent studies and concluding that such programs do not lower recidivism rates or change batterers' attitudes). But see STEPHEN BOCKO ET AL., MASS. TRIAL COURT, RESTRAINING ORDER VIOLATORS, CORRECTIVE PROGRAMMING AND RECIDIVISM (2004) (finding some apparent benefit from anger management programs).

¹⁰⁷ See, for example, the following caution, found on the website for the New York Model for Batterer Programs:

Top 10 Reasons (*otherwise known as Underlying Principles*) . . . why the NY Model for Batterer Programs does not treat, fix, cure, rehabilitate or otherwise get individual men to stop abusing women. [*We believe we must share the underlying principles that the NY Model is based upon, otherwise the model itself may not make sense.*]

. . . .

2. Focusing on ‘fixing’ gives a false sense of security and creates a distraction. Abused partners, family members, the courts and the community – literally everyone involved has, at one time or another, wanted batterer programs to “work.” It is a reasonable and predictable hope.

However, batterer programs don't reliably work. At best, results are inconclusive. And those programs that purport to achieve some individual change indicate, by their own admission that “successes” are few and far between. What batterer programs do give, unfortunately, is a false sense of security that a man will be fixed simply because he is enrolled in a program.

Top Ten Reasons, NEW YORK MODEL FOR BATTERER PROGRAMS, <http://www.nymbp.org/principles.htm> (last visited Aug. 20, 2010).

[Programs that] promot[e] . . . anger management, communication skills, conflict resolution, budget counseling, etc. are not remedies for domestic violence. . . .

Domestic violence is not about relationships It is about abusers and their use of violence. [It] is instrumental, not accidental violence; purposeful, not incidental violence; premeditated, not spontaneous violence. Abusers do not strike their partners because they are out of control. They strike their partners to maintain control over them, humiliate and debase them, isolate them, or punish them for asserting their independence.

Bank robbers do not rob banks because they have relationship problems with the banks or an inability to control their anger over capitalism. They rob banks because, as Willie Sutton aptly explained, that is where the money is. The same applies to abusers and why they abuse.¹⁰⁸

With batterers seemingly having so little cause for concern about the possible consequences of non-compliance with orders of protection, the evidence on the actual deterrent effect of these orders should come as no surprise. One of the first studies, conducted shortly after the widespread adoption of protective order legislation, found that orders were generally ineffective in stopping physical violence.¹⁰⁹ Other studies since then have been similarly disheartening.¹¹⁰ This is not to suggest that there is no evidence at all of a deterrent effect. One widely-cited study, for example, found that in some circumstances, receiving a permanent order of protection may reduce the likelihood that a battered woman will be assaulted again by the same abuser.¹¹¹ However, studies have also consistently shown that orders have less effect on men with prior

¹⁰⁸ *Personal Responsibility, Work, and Family Promotion Act of 2005: Hearing on H.R. 240 Before the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Andrew Robert Klein, Ph.D., Advocates for Human Potential, Inc.).

¹⁰⁹ Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, in *CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF A LEGALLY MANDATED CHANGE* 13, 22–24 (Claudine Weber & Clarice Feinman eds., 1985).

¹¹⁰ See, e.g., Harrell & Smith, *supra* note 83, at 223 (finding a 60% re-abuse rate in a one-year period following the issuance of a restraining order); *id.* at 209 (finding a 48.8% rate of re-abuse within two years after an order was issued).

¹¹¹ Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 589–92 (2002) (pointing out that their study focused exclusively on police-reported incidents of violence, which they noted is estimated to be about one-half the actual number of incidents); *id.* at 594 (citing BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, *VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY* (1995)).

criminal histories,¹¹² men who are unemployed,¹¹³ and men who have substance abuse problems.¹¹⁴ Among batterers who have been arrested, although married and employed men tend to be deterred to some extent, violence is actually exacerbated when the batterer is unemployed and unmarried.¹¹⁵ The lesson, it seems, is that if all batterers were married, employed full-time, and without criminal records or substance abuse problems, orders of protection might provide significant deterrence. In the real world, however, with batterers unfortunately well-represented in every segment of our society, widespread deterrent impact is nothing more than a pipe dream.

Having focused thus far on false assumptions relating to the impact of orders of protection on batterers, we now turn to a different and, we believe, far more pernicious false assumption, this one having to do with the impact of the remedy on the women it is supposed to help. Simply put, here we refer to the assumption that, for women who avail themselves of the remedy, it will, in fact, have the desired empowering effect. This assumption stems from a complete misunderstanding of the reality of domestic violence for women who experience it and, thus, about what it would take to empower them to take control of their own lives. The misunderstanding is especially acute when it comes to poor women who, studies show, are particularly vulnerable to domestic violence and its pernicious effects.¹¹⁶

When people hear about a woman suffering abuse at the hands of her intimate partner, the usual first question is, "Why doesn't (or didn't)

¹¹² Klein, *supra* note 96, at 202.

¹¹³ Richard J. Gelles, *Constraints Against Family Violence: How Well Do They Work?*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 36 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

¹¹⁴ Klein, *supra* note 96, at 202.

¹¹⁵ Janell D. Schmidt & Lawrence W. Sherman, *Do Arrests Deter Domestic Violence*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 48 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). As one study pointed out, these findings are wholly consistent with what is known as the "stake in conformity" thesis of social control. Matthew J. Carlson et al., *Protective Orders and Violence: Risk Factors for Re-abuse*, 14 J. FAM. VIOLENCE 205, 208 (1999). Originated by sociologist Jackson Toby and popularized among domestic violence researchers through an article by Lawrence W. Sherman and others, this thesis essentially posits that the more a batterer stands to lose by disobeying an order of protection, the greater the likelihood of compliance. Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 681-83 (1992). One study has suggested that in arrest cases, police adherence to a previously established set of "fair" procedures and the man's perceptions as to whether he is being treated fairly by the police may also affect the recidivism rate. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice to Spouse Assault*, 31 LAW & SOC'Y REV. 163, 175 (1997).

¹¹⁶ See, e.g., Meehan Richmond, *The Interface of Poverty and Violence Against Women: How Federal and State Welfare Reform Can Best Respond*, 35 NEW ENG. L. REV. 569, 570-73 (2001) ("[D]omestic 'violence affects poor women in two critical ways: it makes them poor and it keeps them poor.'" (quoting Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1144 (1995))).

she leave?"¹¹⁷ Although there are many answers to that question,¹¹⁸ the creation of the order of protection remedy appeared to some to be one solution to the problem of battered women not leaving their batterers. "Why doesn't she leave?" would no longer be a concern, it was thought, if we simply empowered her to make him leave instead. Imagining that to be an answer to the problem, however, assumes that once he is gone, she will be fine. The assumption essentially is that the physical and/or emotional abuse is the only problem. In reality, however, nothing could be further from the truth. Many abusers so isolate and demoralize their victims that the victims are left with few support systems, and hence have great difficulty getting on their feet when an order of protection finally frees them of their abuser's presence.¹¹⁹ Often their jobs have been jeopardized by, if not lost entirely because of, the ongoing abuse.¹²⁰ When a batterer leaves the household, his income often leaves with him despite orders that he pay child support and maintenance. Some women are reluctant to insist upon the payments because they believe that they may be at greater risk of retaliation and violence if they make such demands.¹²¹

Even if the woman is granted residence in the home, she may not be able to make the payments necessary to remain there. A woman may also flee the home because she fears having her batterer know where she is living. If space in a domestic violence shelter is available at all,¹²² women who escape to these shelters are generally allowed to stay for

¹¹⁷ It is telling that this is the question that usually comes up when dealing with domestic violence, not the question, "Why do men batter?" See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 558 (1992).

¹¹⁸ See Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999).

¹¹⁹ See NAT'L CTR. FOR VICTIMS OF CRIME, DOMESTIC VIOLENCE VICTIMIZATION (2002), available at http://ojp.usdoj.gov/ovc/publications/infores/help_series/pdfxtxt/domesticviolencevictimization.pdf ("The emotional effects of domestic violence can often be more devastating than the physical assaults. Victims may lose touch with friends and family due to abusers' attempts to isolate them. As a victim's support system breaks down, so does his or her self-esteem.").

¹²⁰ WORLD HEALTH ORG., *supra* note 11, at 100.

¹²¹ See Heather R. Parker, *Access Denied: The Disconnect Between Statutory and Actual Access to Child Support for Civil Protection Order Petitioners*, 76 U. CIN. L. REV. 271, 285-87 (2007).

¹²² According to a 2007 nationwide census of domestic violence shelters and services, during the one-day period covered by the census, there were 1,740 unmet domestic violence-related requests for emergency shelter. See NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC VIOLENCE COUNTS 2007: A 24-HOUR CENSUS OF DOMESTIC VIOLENCE SHELTER AND SERVICES ACROSS THE UNITED STATES 5 (2007). Extrapolated over a full year, and without taking into account that only about two-thirds of identified domestic violence programs participated in the one-day count, that would amount to over one million unmet requests annually.

only a limited time¹²³—certainly, less than the 6–10 months it takes on average for a homeless family to secure housing.¹²⁴ For some of these women, their spotty work record and poor credit, which frequently go hand-in-hand with domestic abuse, may hinder their ability to obtain adequate housing.¹²⁵ The net effect is that many of these women and their children become homeless.¹²⁶ The strong link between domestic violence and homelessness means that some women are forced to choose between safety for themselves and their children and shelter.¹²⁷

The fallout from the constant exposure to threats, violence, intimidation, and psychological abuse complicates the picture for the supposedly now-freed battered woman even more. Domestic violence victims often suffer from depression and display typical symptoms of stress such as anxiety, nightmares, hyper-vigilance, low self-esteem, and feelings of hopelessness and helplessness.¹²⁸ Nonetheless, women who have been isolated, abused, and under the control of a batterer over time often fail to seek out medical and mental health professionals to address these issues.¹²⁹ Some cope with their depression and social isolation by self-medicating.¹³⁰ When the batterer is finally taken out of the home and

¹²³ See NAT'L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, VIOLENCE AGAINST WOMEN ACT 2005: TITLE VI –HOUSING, *available at* <http://www.ncdsv.org/images/TitleVIHousingVAWA2005.pdf> (“Many domestic violence shelters are unable to house families longer than 30 days . . .”).

¹²⁴ *Homeless Families*, UNITED WAY OF KING COUNTY, <http://www.uwkc.org/kcca/impact/Homelessness/family.asp> (last visited Aug. 21, 2010).

¹²⁵ For the results of a Massachusetts study that looked at these problems, see THE ECON. STABILITY WORKING GROUP OF THE TRANSITION SUBCOMM., GOVERNOR’S COMM’N ON DOMESTIC VIOLENCE, VOICES OF SURVIVAL: THE ECONOMIC IMPACTS OF DOMESTIC VIOLENCE, A BLUEPRINT FOR ACTION 3 (2002). According to the report, “sixty percent of those testifying [at hearings before the working group] cited job loss, including being suspended and fired, as a direct or indirect result of domestic violence.” *Id.* In the course of the hearings, the group “heard [testimony] about how domestic violence impeded victims’ performance or job advancement . . . [and] caused them to miss work, be late, or leave work early”; and they heard about how “abusers . . . stalk, harass and sabotage their partners at work . . . steal and forge signatures on paychecks, and strip victims of their bank accounts, credit and sometimes their identities.” *Id.*

¹²⁶ See Ellen L. Bassuk et al., *Responding to the Needs of Low Income and Homeless Women Who Are Survivors of Family Violence*, 53 J. AM. MED. WOMEN’S ASS’N 57, 57–64 (1998) (finding that 60% of all homeless women have been victims of intimate partner violence as adults); see also THE U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES 11 (2008), *available at* <http://www.usmayors.org/hhsurvey2007/hhsurvey07.pdf> (citing survey-based report citing domestic violence as one of the top three causes of homelessness among households with children).

¹²⁷ See Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL’Y 237, 237 (1994); Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420, 421 (1991).

¹²⁸ WORLD HEALTH ORG., *supra* note 11, at 101–02.

¹²⁹ See, e.g., Michelle Fugate et al., *Barriers to Domestic Violence Help Seeking: Implications for Intervention*, 11 VIOLENCE AGAINST WOMEN 290, 290 (2005).

¹³⁰ See WORLD HEALTH ORG., *supra* note 11, at 101.

restrained from contact, these substance abuse issues may hinder the woman from being able to maintain full-time work, provide adequate care for children, or seek appropriate services that will assist in her recovery from the abuse. In short, getting the batterer to leave the home may be a good first step toward protection from domestic violence, but there are many additional issues that must be addressed for that remedy to be meaningful.

Offering victims of domestic violence the remedy of seeking an order of protection further assumes that getting an order will make them safe—or at least, safer. In reality, however, women who leave their batterers are often at a heightened risk of serious assault.¹³¹ As the authors of one study put it, “In spite of the widespread misconception that ending the relationship will end the violence, it is quite common for batterers to continue or even escalate the violence after the relationship ends.”¹³² Scholars have called this “separation assault”¹³³ and it is well-documented.¹³⁴ Often when a victim leaves her batterer, instead of accepting that the relationship is over, the batterer continues his pattern of trying to exert power and control over her. As previously noted, batterers violate orders of protection by harassing, stalking, threatening, and assaulting their former partner.¹³⁵ Thus, far from enhancing her safety, obtaining an order of protection may actually put a battered woman in increased danger.

The final assumption we discuss here focuses, not on either the batterer or the abused woman, but on the steps our society has taken to address domestic violence. We call it the “pat-on-the-back” assumption:

¹³¹ See Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675, 675 (2004).

¹³² Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1364–65 (2000) (citations omitted).

¹³³ Martha Mahoney coined the term “separation assault” and explored the phenomenon extensively in her pioneering article. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

¹³⁴ See *id.*; see also Charlene K. Baker et al., *Domestic Violence and Housing Problems: A Contextual Analysis of Women's Help-seeking, Received Informal Support, and Formal System Response*, 9 VIOLENCE AGAINST WOMEN 754, 754–83 (2003); Walter S. DeKeseredy & Carolyn Joseph, *Separation and/or Divorce Sexual Assault in Rural Ohio: Preliminary Results of an Exploratory Study*, 12 VIOLENCE AGAINST WOMEN 301, 301–11 (2006); Marilyn Ford-Gilboe et al., *Strengthening Capacity to Limit Intrusion: Theorizing Family Health Promotion in the Aftermath of Woman Abuse*, 15 QUALITATIVE HEALTH RES. 477, 477–501 (2005); Marina Morrow et al., *Women and Violence: The Effects of Dismantling the Welfare State*, 24 CRITICAL SOC. POL'Y 358, 358–84 (2004); Robert Walker et al., *An Integrative Review of Separation in the Context of Victimization: Consequences and Implications for Women*, 5 TRAUMA, VIOLENCE, & ABUSE 143, 143–93 (2004). Anecdotally, the story of John Alexander's murders of his estranged wife Kelli and her friend April Wheeler, recounted in the epigraph to this Article, provides an example of this phenomenon.

¹³⁵ See *supra* notes 109–11 and accompanying text.

the sense that, while we have by no means conquered the problem of domestic violence, at least we are finally taking it seriously. One need not look far, however, to find examples of strategies used to attack other serious social problems that, when compared with how we have thus far dealt with domestic violence, leave plenty of room to question just how serious we really are.

For example, look at our treatment of sex offenders. To deal with them, we have adopted all kinds of special provisions and rules not applicable in other situations, including, although not limited to, special evidence rules that allow otherwise inadmissible evidence of a defendant's prior similar offenses at trial,¹³⁶ special trial procedures that allow at least some alleged victims to testify outside the presence of the defendant,¹³⁷ special laws that authorize civil commitment once a sentence has been served,¹³⁸ and special provisions that require those who are convicted but not civilly committed to register for listing in a sex-offender registry upon their release from custody and then again any time they move, making their names and addresses readily available on the web as a warning to those who live nearby.¹³⁹

To those who might argue that sex offenders are nothing like batterers, we would merely point out that one of the main rationales given for all this special treatment of the former is that sex offenders ostensibly pose an unusually high risk of recidivism, and so if not stopped, will continue to commit their truly horrendous crimes over and over again.¹⁴⁰ Clearly, batterers fit that profile. In fact, the recidivism rate for batterers is much higher than that of sex offenders.¹⁴¹ Two Massachusetts Proba-

¹³⁶ See, e.g., FED. R. EVID. 413–15 (singling out for special treatment evidence of a defendant's prior similar acts in criminal and civil cases involving claims of sexual assault or child molestation).

¹³⁷ See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990) (upholding against constitutional challenge the Maryland procedures for allowing a child witness to testify for the prosecution in a child sexual abuse case outside the presence of the accused).

¹³⁸ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding as constitutional the procedures under the state's Sexually Violent Predator Act for allowing the forcible civil commitment of persons meeting the statutory definition after they have served their full sentence for a criminal offense).

¹³⁹ See, e.g., Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Megan's Law), 42 U.S.C. § 14071 (2006).

¹⁴⁰ See Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules Of Evidence*, 58 CATH. U. L. REV. 153, 184 (2008) (“[Among the rationales for special evidence rules in sexual assault and child molestation cases offered by Congressional sponsors of Federal Rules 413–15 were that]: (1) sexual crimes are committed by a ‘small class of depraved criminals’; [and] (2) these ‘depraved criminals’ are more likely than their criminal counterparts to repeat their acts” (citation omitted)).

¹⁴¹ Persons who commit sex offenses are not a homogeneous group but instead fall into several different categories. Looking at reconviction rates alone, one large-scale analysis reported that child molesters had a 13% reconviction rate for sexual offenses and a 37% reconviction rate for new, non-sex offenses over a five-year period and rapists had a 19%

tion Office studies make this point well. One study looked at all persons in the state who had a civil restraining order filed against them over a six-year period, and found that nearly 25% were what the study called “serial batterers,” that is, persons named in at least two orders involving at least two unrelated victims.¹⁴² The second of the studies focused on persons who had been arraigned for violating a civil restraining order during a single year, and found that over 40% met the serial batterer definition.¹⁴³ The latter of the two summed up the findings of the two studies together this way:

Forty-three percent (43%) of those charged with a violation of a restraining order had more than one victim; 16% had three or more victims, consistent with their portrait as high risk violent individuals. The figures on these defendants, who have multiple victims, are much higher than the 23.3% previously reported in our earlier study on civil stage serial batterers. The earlier study sampled only those who had a civil restraining order filed against them; the current study focuses on those who have been arraigned for a violation of a civil restraining order. One would expect a larger proportion of defendants with multiple victims among this group. Figures show that abusive behavior can persist and be acted out against a number of individuals. *Many defendants are going to abuse whoever enters into a relationship with them.*¹⁴⁴

We want to emphasize, we do not advocate inflicting the treatment that our society now visits on sexual predators on anyone. Our point, again, is that this is what “taking seriously” can look like. Would anyone ever consider, for even a minute, telling a sexual predator’s victim to go to court and seek an order if they want the conduct to stop?

reconviction rate for sexual offenses and a 46% reconviction rate for new, non-sexual offenses over a five-year period. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998). Another study found reconviction rates for child molesters to be 20% and for rapists to be approximately 23%. Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85 (1995). On the other hand, a five-year study of batterers in Duluth, Minnesota, looking just at men who had received some form of treatment following the battering incident, found that 40% of these men were in the justice system for battering the same partner, a different woman, or had a protective order taken out against them. Melanie Shepard, *Predicting Batterer Recidivism Five Years After Community Intervention*, 7 J. FAM. VIOLENCE 167 (1992).

¹⁴² SANDRA ADAMS, MASSACHUSETTS TRIAL COURT, SERIAL BATTERERS: PROBATION RESEARCH BULLETIN (1999).

¹⁴³ BOCKO ET AL., *supra* note 106.

¹⁴⁴ *Id.* (citation omitted).

Of course, responding to serious social problems takes time and does not happen overnight. On the other hand, one need only consider the response to the events of September 11, 2001 to see just how much can be done in a short time if the resolve is there. The array of anti-terrorism laws and programs that our government managed to put in place in less than a year's time following the events of that day is truly mind-boggling.¹⁴⁵ Every American's life has changed in fundamental

¹⁴⁵ On April 11, 2002, the Department of Homeland Security issued a press release that detailed all that had been done to protect homeland security beginning in September 2001:

1. Deployed more than 4,000 FBI special agents and 3,000 support staff to the international investigation of the September 11 terrorist attacks - the largest criminal investigation in history.
2. Responded to more than 8,000 cases of anthrax attacks or hoaxes.
3. Implemented the USA PATRIOT Act which, among other things: 1. updated Federal laws to reflect the rapid and dramatic changes that have taken place in recent years in communications technology; 2. required the Department of the Treasury to require financial institutions to verify the identities of persons opening accounts, granted immunity to financial institutions that voluntarily disclosed suspicious transactions, and increased the penalties for money-laundering; 3. broadened the terrorism-related definitions in the Immigration and Nationality Act, expanded the grounds of inadmissibility to include aliens who publicly endorse terrorist activity, and required the Attorney General to detain aliens whom he certifies as threats to national security; 4. authorized grants that will enhance state and local governments' ability to respond to and prevent terrorism, and expanded information-sharing among law enforcement authorities at different levels of government.
4. Established 56 Joint Terrorism Task Forces and nearly 100 Anti-Terrorism Task Forces to coordinate the investigations and improve communications among federal, state, and local law enforcement.
5. Launched Operation Green Quest to dry up sources of terrorist funding. To date, the assets of 192 individuals and organizations connected with the al-Taqua, al-Barakaat, and Hamas organizations have been frozen.
6. Established a web site and toll-free hotline for citizens to report suspected terrorist activity.
7. Adopted new, stronger encryption standards to safeguard sensitive, non-classified electronic information such as financial transactions, and ensure the privacy of digital information ranging from medical records and tax information, to PIN numbers for millions of Americans.
8. Border and Port Security - Proposed INS regulations to eliminate the current minimum six months admission period for B-2 visitors for pleasure, replacing it with "a period of time that is fair and reasonable for the completion of the purpose of the visit."
9. Immediately required individuals planning to attend school in the United States to obtain the proper INS student visa prior to their admission to the country.
10. Proposed INS regulations to reduce the maximum visa extension from one year to six months. Additionally, the visitor must prove there are adequate financial resources to continue to stay in the United States and that he or she is maintaining a residency abroad.
11. Placed the nation's air, land, and seaports of entry on Alert Level 1 following September 11, ensuring a more thorough examination of people and cargo.
12. Created the new Customs Trade Partnership Against Terrorism (Customs-TPAT) initiative to enhance security throughout the entire import-export process.

-
13. Launched the Container Security Initiative, which establishes a tough new international security standard for cargo containers.
 14. Deployed approximately 1,600 National Guardsmen to assist in securing the nation's borders.
 15. Increased National Park Service personnel and upgraded security equipment and the procedures at highly visible national monuments, such as the Statue of Liberty in New York, the National Mall in Washington, the Liberty Bell and Independence Hall in Philadelphia, the Gateway Arch in St. Louis, and other sites in the 384-unit National Park System.
 16. Transportation Security - Recruited thousands of federal security personnel to perform screening duties and other functions at commercial airports.
 17. Significantly expanded the Federal Air Marshal program.
 18. Announced the first group of Federal Security Directors. These experienced law enforcement officers will be directly responsible for security at airports and provide a clear and direct line of authority.
 19. Developed new passenger boarding procedures and trained pilots and flight crews for hijacking scenarios.
 20. Required all airport personnel to undergo background checks.
 21. Limited airport access points and implemented secondary screening procedures.
 22. Deployed more than 9,000 National Guardsmen to help secure the nation's airports.
 23. Health and Food Security - Aided thousands of rescue workers involved in the September 11 recovery activities through Disaster Medical Assistance Teams (DMATs).
 23. Identified more than 750 victims of the World Trade Center attacks through Disaster Mortuary Operational Response Teams (DMORTs).
 24. Dispensed antibiotics to thousands of persons potentially exposed to anthrax mail attacks.
 25. Acquired more than a billion doses of antibiotics and signed agreements for the procurement of the small pox vaccine.
 26. Distributed \$1.1 billion to help states prepare for bioterrorism attacks.
 27. Strengthened systems to prevent, detect and eliminate threats to agriculture and the food supply, including \$328 million for pest and animal disease prevention, food safety, research, laboratory upgrades and stepped up security at key facilities.
 28. Distributed \$2 million in grants to 32 states to bolster emergency animal disease prevention, preparedness, response and recovery systems.
 29. Improved inspection and testing of products destined for consumer markets in the United States.
 30. Provided millions of dollars through the Food Stamp and Women, Infants, and Children (WIC) programs to families of victims and displaced workers of the September 11 attacks.
 31. Environmental and Energy Security - Provided security training to drinking water and wastewater utility companies.
 32. Provided security guidance and support to private sector chemical and pesticide manufacturers.
 33. Conducted vulnerability assessments of energy infrastructure throughout the country.
 34. Created a 24-hour network to ensure energy producers have up to date information from law enforcement information.
 35. Provided 24 hour-per-day, 7 day-a-week security at 348 dams and reservoirs and 58 hydroelectric power plants, including Hoover, Grand Coulee, Glen Canyon, and Shasta Dams.
 36. Constructed biological, radiological, and nuclear mobile detection capability to conduct threat-based searches.

ways due to the government's decision to take terrorism seriously. Again, we point this out, not as advocates of our government's so-called war on terror, but to suggest that the pat on the back we have given ourselves for all we have done to deal with the problem of domestic violence may not be justified.

A comparison between the responses to this country's September 11th experience and responses to domestic violence is instructive in other ways as well. Ironically, as Catharine MacKinnon has noted, the approximately 3,000 people who died on September 11th is almost the same number of women who die at the hands of male intimates in the United States every year.¹⁴⁶ Nevertheless, MacKinnon points out:

Much of the international community has mobilized forcefully against terrorism. This same international community that turned on a dime after September 11th has, despite important initiatives, yet even to undertake a comprehensive review of international laws and institutions toward an effective strategic response to violence against women with all levels of response on the table, even as the "responsibility to protect" from gross and systemic violence is increasingly emerging internationally as an affirmative duty.¹⁴⁷

-
- 37. Placed nuclear power plants across the nation on the highest level of security.
 - 38. Developed pocket radiation detector for first responders.
 - 39. Engaged in a top-to-bottom security review of nuclear facilities, including plant vulnerability to aircraft.
 - 40. Citizen Engagement - Established Citizen Corps to enable Americans to participate directly in homeland security efforts in their own communities. These components include:
 - 41. Medical Reserve Corps: Enables retired healthcare professionals to effectively augment local health officials' capacity to respond to an emergency.
 - 42. Operation TIPS (Terrorist Information and Prevention System): Allows millions of American transportation workers, postal workers, and public utility employees to identify and report suspicious activities linked to terrorism and crime.
 - 43. Community Emergency Response Teams (CERT): Enables individual Americans to participate in emergency management planning in their communities and prepare to respond to disasters and other emergencies.
 - 44. Neighborhood Watch Programs: Enhances the program by incorporating terrorism prevention into its mission.
 - 45. Developed the "Patriot Readiness Center" to help federal retirees return to active service - more than 15,000 people have responded.

Press Release, U.S. Dep't of Homeland Security, Strengthening Homeland Security Since 9/11 (Apr. 11, 2002), available at http://www.dhs.gov/xnews/releases/press_release_0042.shtm.

¹⁴⁶ Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 4 (2006).

¹⁴⁷ *Id.* at 2.

MacKinnon suggests that one of the most striking post-September 11th changes was a “paradigm shift” in our willingness to treat private individuals who perpetrate violence against civilians in ways previously reserved just for states.¹⁴⁸ Regarding this shift, MacKinnon remarks, “[I]t shows what they can do when they want to.”¹⁴⁹ She continues:

Violence against women is imagined to be nonstate, culturally specific, expressive acts of bad apple individuals all over the world that is so hard to stop. Terrorism, which is all of these, is said to be so serious, there is no choice but to stop it, while seriously addressing threats to women’s security is apparently nothing but a choice, since it has barely begun.¹⁵⁰

Investing faith in victim empowerment as the solution to the problem of domestic violence has paved the way for the ultimate false assumption—the idea that when the solution fails, it is because of some failure on the victim’s part: she won’t leave her batterer (or left but returned), she won’t get a restraining order (or got one but later dropped it), she won’t call the police (or did call them but then declined to follow through with the prosecution), or, recalling the epigraph to this Article, although she left and got a restraining order against her batterer, she failed to carry a loaded gun when transporting the couple’s children to a court-ordered visitation with him.¹⁵¹ The state cannot be held accountable for that, nor can any of the rest of us.¹⁵² Battered women therefore experience all the perils of so-called “empowerment.”

B. Ideology in Tension with Strategy

For battered women’s activists, as a matter of ideology, taking an empowerment-based approach to domestic violence made perfect sense. As a matter of strategy, however, legislatively empowering individual battered women to deal one-by-one with the violence against them is ill-conceived as a way of achieving the sort of social change that movement

¹⁴⁸ *Id.* at 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 18, 19.

¹⁵¹ See Madden, *supra* note 5, at B6.

¹⁵² As Ann Jones puts it:

Think of the messages a battered woman receives: A good marriage is worth fighting for. You can’t just walk out at the first sign of trouble. It’s up to you to make it work. He needs you. Stand by your man. For better or worse. Til death do us part. Love means never having to say you’re sorry. A good man is hard to find. Good husbands are made by God, good marriages by women. Children need their father. You owe it to him to help him through this. And so on, ad nauseum. And don’t forget, he loves you.

ANN JONES, NEXT TIME SHE’LL BE DEAD: BATTERING AND HOW TO STOP IT 127 (2000).

activists had in mind. In fact, if anything, the decision to pursue an empowerment strategy actually worked to undermine the movement's larger objectives.¹⁵³ A comparison between these activists' social change agenda and the legislative measures they advocated will help shed light on the tension between the two.

Recall that movement activists were seeking, among other things: (1) to obliterate the old public/private dichotomy; (2) to foster a new view of domestic violence as a societal harm that touches everyone, including people who were not, and never had been, involved in a battering relationship; and (3) to persuade these previously-uninvolved third parties that, because they are harmed by violence in other people's intimate relationships, it is appropriate for them to get actively involved in a broad-based effort to combat the problem.¹⁵⁴ Against that backdrop, however, they opted to press for the creation of a new legal tool that, to ensure autonomy, victims could use or not as they saw fit. Other aspects of the new regime they advocated, including improvements in the criminal justice process response to domestic violence, also put a premium on greater victim control. If one accepts, as we do, Cass Sunstein's idea that law has an "expressive function"¹⁵⁵—in other words, that law can "mak[e] statements"¹⁵⁶—then consider the message conveyed by this new, victim-initiated, private remedy: the onus is on each domestic violence victim to seek a solution to her problem; the violence and other forms of abuse ostensibly being inflicted on her by her batterer are strictly between the two of them; and if she is not concerned enough about the abuse to take legal action, then neither are we. No doubt, this was not the message that advocates of the empowerment approach intended to convey; after all, it smacks of the very view of domestic violence that they were fighting to overcome. But they did not anticipate what "autonomy" and "empowerment" would mean to those who did not look at the problem of domestic violence through the same lens as the movement did.

To begin with, the terminology itself left room for confusion. Granting a battered woman the power to obtain a protective order against her batterer suggests some notion of autonomy, but without also granting her the necessary resources and support, it is a false notion of autonomy given the reality of the impact of violence on women's lives. A woman who is responsible for the care of her children, her home, and the other

¹⁵³ To be fair, the movement's larger objectives were also undermined by the increased reliance on the state to address the problem of domestic violence. See GOODMAN & EPSTEIN, *supra* note 15, at 36.

¹⁵⁴ See *supra* notes 21–26, 59–62 and accompanying text.

¹⁵⁵ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

¹⁵⁶ *Id.* at 2024.

relationships in her life is by definition not autonomous. Legislatively granting to her something she cannot possibly have will not change that. Movement advocates understood all of this. But from the perspective of those outside the movement, the emphasis on autonomy justified the view that women are responsible for ending the abuse in their lives and that failure to do so is their own fault.

Advocates of the empowerment approach also did not appreciate that the focus on autonomy, even as it supported empowerment, nonetheless still supported the public/private distinction.¹⁵⁷ Instead of making domestic violence a public concern, it keeps it private, retaining all the isolation and individualism that characterize the so-called private realm. The personal is still personal. Although having some remedy for domestic violence is a major improvement over the era in which harm done in the home was not actionable at all, the empowerment approach has left the social and cultural backdrop relatively undisturbed.

All this having been said, we want to emphasize that, although we think our current approach to domestic violence is problematic, we do not advocate dismantling the law in this area. For one thing, for women who are in abusive relationships, any avenue that could potentially provide them with support in combating the violence against them is a plus. The possible expressive effects of, or “statements” made by, such a move would also concern us. Depriving abused women of an existing remedy that purports to empower them to take charge of their lives simply sends a bad message. More importantly, any such dismantling of—indeed, even just minor tinkering with—empowerment-centered legislation might well be understood to suggest that, to address the problem of domestic violence, the law is where the spotlight ought to be. As elaborated below, however, we are convinced that to make real headway at this point, what is needed most is a drastic shift in focus and emphasis away from the applicable legal rules and remedies and more in the direction of the social and cultural norms that have enabled the problem to persist so stubbornly.

III. CHANGING SOCIAL NORMS

“Social norms,” in the words of one observer, “[l]ike cows, . . . are easier to recognize than to define.”¹⁵⁸ For our purposes, it is enough to think of them as the non-official but very real rules and expectations that prescribe how people are supposed to behave in various contexts—the governing “shoulds” and “shouldn’ts,” as it were. Social norms are often

¹⁵⁷ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 21 (2004).

¹⁵⁸ Kaushik Basu, *Social Norms and the Law*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 476 (Peter Newman ed., 1998).

built around assumptions and beliefs about how people behave and respond. By contrast with legal rules, which purport to regulate behavior via a system of specified official sanctions to be imposed when infractions occur, social norms perform their regulatory function largely by virtue of the fact that people tend to care a great deal about what other people think of them. This in turn motivates us to behave in ways that conform to what we think will gain the approval of others and, perhaps even more importantly, avoid their disapproval.

As noted previously, battered women's advocates well understood the role of social norms in relation to the problem of domestic violence and identified several such norms in particular as prime targets for change.¹⁵⁹ For our purposes, it is helpful to think of these norms as falling into two categories, one focusing on the abuse itself, the other focusing on how we as a society respond to it. In the first of these categories is a set of norms that, taken together, condone male power over and aggression against women.¹⁶⁰ In the latter category are the various norms that tell us that abuse within an intimate relationship is a private matter, properly the business of no one except the two intimates themselves.¹⁶¹ This is not to suggest that the two categories are wholly separate; to the contrary, notions about gender and power play such a prominent role in both that they are of necessity intertwined. Nonetheless, viewing the norms in this way will help to clarify what we think the problem is with the empowerment approach: it simply does not take sufficient account of the latter category of norms, that is, the norms that tell us, in effect, that however we personally may feel about the problem of domestic violence, if violence of this sort is being done by and to someone else, it is not our concern. In fact, we are convinced that progress toward changing these particular norms—in other words, toward persuading people to view and treat the problem of domestic violence as everyone's concern—has actually been thwarted because of our reliance on this approach to the problem. This, then, is the norms challenge to which we now turn.

We begin with a brief look at a few examples of the all-too-familiar thinking to which we refer. How often are these kinds of statements made in discussions of a seemingly abusive relationship:

¹⁵⁹ See *supra* notes 21–26, 59–62, 155.

¹⁶⁰ The lessons of traditional gender-role socialization are perhaps the most obvious manifestation of these norms. Although clearly less rigid than they once were, these norms still teach, for example, that men are supposed to be physically strong, independent, unemotional, and in charge; while women are supposed to be sexually attractive and otherwise pleasing to men, submissive, and emotional. Such familiar sayings as “a man's home is his castle” and “[a woman should] stand by [her] man” also express these norms.

¹⁶¹ See generally KELLY, *supra* note 23 (arguing that fully addressing the problem of domestic violence requires confronting the idea that it is a private issue).

“What goes on within a couple’s intimate relationship is no one else’s business but theirs. This is true even of violence between them. After all, who am I to say what’s right for them? Granted, presumably, no woman whose male domestic partner beats and otherwise abuses her wants the violence and abuse to continue. But all intimate relationships involve ‘trade-offs’; and I certainly am in no position to tell her that whatever trade-offs she is making that seemingly have her tolerating his abuse are not, or should not be, worth it to her. Anyway, she is an adult, and if she feels she has had enough, she can always leave.”

“Even if I personally thought that getting involved was the right thing to do, I know how much people look down on other people who stick their noses into things that are none of their business (names like ‘prying,’ ‘meddlesome,’ ‘busybody,’ and worse come to mind), and I just am not one to rock the boat.”

The challenge, as we see it, amounts to this: how, if at all, does one go about persuading people that something they have previously regarded as none of their business is, instead, properly their concern? Or, placed in context, how does one go about changing the social norms that have long told us that other people’s domestic violence is none of our business (or worse, the fault of the victim), so that such violence is instead widely regarded as everyone’s concern?

Experience with other social problems teaches that the problems that arouse the greatest concern throughout the community are often those that pose, or at least are perceived as posing, a genuine safety risk to the public at large: the general fear of being on a train when suicide bombers choose to detonate their bombs, of being grabbed off the street by sexual predators seeking to feed their depraved drives or by addicts seeking money for drugs, or of being attacked by undeterred criminals who, if not warehoused when caught, will commit the same crime again, and again. Clearly when something is viewed as affecting our own safety and well-being, we have no reservations about getting involved. Bearing that idea in mind, and recalling the question about changing domestic violence-related norms posed above—“how does one go about changing the social norms that have long told us that other people’s domestic violence is none of our business (or worse, the fault of the victim)?” One answer, it seems to us, may be to educate the general public about the harmful effects of domestic violence on society as a whole. Public health campaigns may serve as useful models for this endeavor, both because of their extensive use of an array of sophisticated public

education and marketing strategies and because the public health community consciously avoids engaging in blame-the-victim approaches to solving health problems.

Perhaps the most successful public health campaign in recent history has been the campaign to curb smoking. Although the analogy is not perfect, the anti-smoking campaign provides a powerful example of how such a campaign can change perceptions of harm and, in so doing, shift the social norms about getting involved. A look at the anti-smoking campaign and some of the strategies it employed is instructive.

The campaign against smoking began in earnest in 1964 with the issuance of the Surgeon General's first report on the effects of smoking.¹⁶² Although anti-smoking activists had been at work before then, the 1964 report brought the issue before the general public for the first time. At the outset, the campaign focused almost exclusively on concern for the smoker. Strategies included extensive warnings about the health risks of smoking and a multitude of programs designed to help people quit. At the same time, however, smoking was regarded as a matter of personal preference, just one of the many autonomous choices that, in a free society, people are entitled to make for themselves. If someone chose to take the risk and suffered harm as a result they would have no one to blame but themselves; but it was a personal decision that was theirs, and theirs alone, to make.¹⁶³

About a decade later, a whole new anti-smoking campaign began to take root. Instead of focusing on smokers, the focus was on the health risks of passive smoking to non-smokers. The impetus was the 1971 Surgeon General's report, which was the first to identify second-hand smoke as a health concern.¹⁶⁴ But it was a 1986 Surgeon General's report, *The Health Consequences of Involuntary Smoking*,¹⁶⁵ that gave this new campaign its most important boost. Using the term "involuntary smoking" to emphasize the lack of choice involved for the people who were being put at risk,¹⁶⁶ the report was unequivocal in concluding that

¹⁶² See ROBERT C. McMILLEN ET AL., MISS. STATE UNIV., *SMOKING IN AMERICA: 35 YEARS AFTER THE SURGEON GENERAL'S REPORT 5* (2000), available at <http://repositories.cdlib.org/context/tc/article/1040/type/pdf/viewcontent/> (last visited Aug. 21, 2010).

¹⁶³ See NAT'L LIBRARY OF MED, *SECONDARY SMOKING, INDIVIDUAL RIGHTS, AND PUBLIC SPACE*, available at <http://profiles.nlm.nih.gov/NN/Views/Exhibit/narrative/secndary.html> (last visited Aug. 23, 2010) [hereinafter *SECONDARY SMOKING*] ("[For years after the first Surgeon General's report], smoking was still regarded as a matter of personal choice and private risk, not of communal good or public policy. In a society that has held individuals responsible for the risks they take—including including health risks—the right to smoke was championed as part of the prerogative of all Americans to lead their own lives.").

¹⁶⁴ U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL* 10, 12, 281 (1971).

¹⁶⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* (1986).

¹⁶⁶ *Id.* at ix–x.

such non-consensual smoking was harmful to the health of non-smokers.¹⁶⁷

The mounting evidence of the dangers of exposure to secondhand smoke began to change the attitudes of nonsmokers. No longer was smoking viewed as a matter of personal choice once people realized that smokers were placing non-smokers at risk. Moreover, as non-smokers became better informed about the dangers to them, they also became more willing to join, or even lead, campaigns to institute new tobacco-free rules and policies. In other words, once they perceived a genuine safety risk to themselves and their loved ones, a matter they once viewed as none of their business became very much their concern. Noting this response, one observer remarked, “[w]hile Americans consider it an aspect of their individual freedom to assume personal risks, they have little tolerance for risks that others impose upon them.”¹⁶⁸

An entire campaign was formulated to change smoking norms by capitalizing on the observed link between concern about the dangers of passive smoking and the willingness to get involved in smoke-free environment efforts. One book explains the approach this way:

The theory of change associated with eliminating non-smokers’ exposure to secondhand smoke starts with increasing people’s knowledge of the dangers of exposure to secondhand smoke, changing their attitudes toward the acceptability of exposing nonsmokers to secondhand smoke, and increasing their support for passing and enforcing tobacco-free policies.¹⁶⁹

Although the main emphasis of the anti-smoking campaign was on health risks, other concerns about passive smoking were highlighted as well. One such concern had to do with the enormous economic costs of

¹⁶⁷ *Id.* at ix (“[D]isease risk due to the inhalation of tobacco smoke is not limited to the individual who is smoking, but can extend to those who inhale tobacco smoke emitted into the air.”).

¹⁶⁸ See SECONDARY SMOKING, *supra* note 163.

¹⁶⁹ G. STARR ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, KEY OUTCOME INDICATORS FOR EVALUATING COMPREHENSIVE TOBACCO CONTROL PROGRAMS 127 (2005), available at http://www.cdc.gov/tobacco/tobacco_control_programs/surveillance_evaluation/key_outcome/pdfs/key_Indicators.pdf. Polling data gives a picture of just how much public attitudes about second-hand smoke changed over time. See, e.g., Lydia Saad, *More Smokers Feeling Harassed by Smoking Bans*, GALLUP NEWS SERVICE, July 25, 2007, available at <http://www.gallup.com/poll/28216/More-Smokers-Feeling-Harassed-Smoking-Bans.aspx> (reporting an increase between 1987 and 2007 in public support for smoking bans applicable to hotels and motels (from 10% in 1987 to 34% in 2007), the workplace (from 17% to 44%) and restaurants (from 17% to 54%)).

passive smoking.¹⁷⁰ Anti-smoking activists found that providing information about these costs together with information about health risks made for an especially powerful one-two punch. According to one account, the net effect was to “highlight[] the social costs of smoking to suggest that smoking was a burden that all members of society had to bear.”¹⁷¹

As a result of the second hand smoke campaign, government buildings, workplaces, restaurants, and even bars have banned smoking on the premises.¹⁷² Smoke-free areas cause considerable inconvenience to those people who wish to engage in a still lawful activity. Twenty-five years ago, no one could have imagined that this campaign would be so successful, particularly in light of the power of the tobacco lobby.¹⁷³ Of course, twenty-five years ago, anti-smoking campaigns were focused primarily on the Surgeon General’s first report on smoking and concern for the smoker.¹⁷⁴ Seemingly, significant change in the societal norm that tolerated smoking did not occur until the public was educated that smoking harmed not only smokers, but non-smokers too.¹⁷⁵

Of course, domestic violence is not smoking, and mounting a norm-changing campaign against it clearly poses a number of challenges that the anti-smoking campaign did not have to address. Chief among these challenges—indeed, it dwarfs all the others— is the fact that unlike the norms associated with smoking, the norms associated with domestic violence are gender norms which, as far as norms go, are among the most

¹⁷⁰ See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, SAVE LIVES, SAVE MONEY: MAKE YOUR BUSINESS SMOKE-FREE (2005), available at http://www.cdc.gov/tobacco/basic_information/secondhand_smoke/guides/business/pdfs/save_lives_save_money.pdf.

¹⁷¹ Christopher J. Bailey, *From “Informed Choice” to “Social Hygiene”: Government Control of Cigarette Smoking in the US*, 38 J. AM. STUD. 41, 54 (2004).

¹⁷² According to a national database maintained by the American Nonsmokers’ Rights Foundation, as of April 1, 2010, “[a]cross the United States, 17,628 municipalities [we]re covered by a 100% smokefree provision in workplaces, and/or restaurants, and/or bars, by either a state, commonwealth, or local law, representing 74.2% of the US population.” AM. NONSMOKERS’ RIGHTS FOUND., OVERVIEW LIST – HOW MANY SMOKEFREE LAWS? (1998), available at <http://www.no-smoke.org/pdf/mediaordlist.pdf>.

¹⁷³ Elsa K. Ong & Stanton A. Glantz, *Tobacco Industry Efforts Subverting International Agency for Research on Cancer’s Second-Hand Smoke Study*, 355 THE LANCET 1253, 1253–59 (2000) (describing the tobacco industry’s multi-million-dollar campaign to discredit the International Agency for Research on Cancer (IARC) study on secondhand smoke).

¹⁷⁴ Kenneth E. Warner, *The Effects of the Anti-Smoking Campaign On Cigarette Consumption*, 67 AM. J. PUB. HEALTH 645 (1977).

¹⁷⁵ Stanton A. Glantz & Patrick Jamieson, *Attitudes Toward Secondhand Smoke, Smoking, and Quitting Among Young People*, 106 PEDIATRICS e82 (2000), available at <http://pediatrics.aappublications.org/cgi/content/abstract/106/6/e82>; Lisa K. Goldman & Stanton A. Glantz, Abstract, *Evaluation of Antismoking Advertising Campaigns*, 279 JAMA 772 (1998), available at <http://jama.ama-assn.org/> (enter “Evaluation of Antismoking Advertising Campaigns” into “search” and select “Evaluation of Antismoking Advertising Campaigns”) (noting that focus group participants indicated that industry manipulation and secondhand smoke are the most effective strategies for denormalizing smoking and reducing cigarette consumption).

resistant to change.¹⁷⁶ Still, enough parallels can be drawn to the anti-smoking campaign to make the exercise worthwhile.

At present, as was once the case with smoking, insofar as the general public is concerned about domestic violence, it tends to be what might be called “detached third-party concern”: we may have an abstract concern about battered women (just as we once did and may still have about smokers), but as long as neither we nor someone close to us is being abused, it seems that we feel we lack enough of an investment to get involved. Of course, currently (and again, as was once true of smoking), domestic violence is not seen as causing harm to the general public. The actual evidence, however, suggests otherwise. Study after study makes clear that the effects of domestic violence are felt, not just within the relationships in which it occurs, but by everyone. Thus, and by way of example only, all of us are put at risk in various ways because of the enormous impact that domestic violence can have on children who are exposed to it in their homes, both while these children are still children and later, when they grow up.¹⁷⁷ All of us can likewise become victims

¹⁷⁶ See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

¹⁷⁷ According to a 1998 study, over half of the women who were abused in their homes live in households with children under the age of twelve. LAWRENCE A. GREENFIELD ET AL., U.S. DEP’T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS OR GIRLFRIENDS (1998). Studies indicate that children who are in such homes are at serious risk of being abused themselves. One study found that 50% of the men who frequently assaulted their partners also abused their children. FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON CHILDREN AND DOMESTIC VIOLENCE 1, <http://ucsfce.org/programs/srvr/pdf/Children.pdf> (last visited Aug. 23, 2010). The U.S. Advisory Board on Child Abuse and Neglect cited domestic violence in the home as the single major precursor to child abuse and neglect fatalities in the U.S. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, A NATION’S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 124 (1995); see also Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Abuse*, NAT’L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (1999), http://new.vawnet.org/category/Main_Doc.php?docid=389 (finding from a review and analysis of records prepared for other purposes, “a large overlap between child maltreatment and woman battering”).

Even when they are not the ones being abused, children who regularly witness domestic violence in their homes can be deeply affected by what they see. The negative consequences for their physical health have been well-documented. See, e.g., Sandra A. Graham-Berman & Julia Seng, *Violence Exposure and Traumatic Stress Symptoms as Additional Predictors of Health Problems in High-Risk Children*, 146 J. PEDIATRICS 349 (2005). Studies also indicate that these children are more likely than other children to be violent and aggressive and to suffer from a range of other problems, including depression, anxiety, and poor academic performance at school. See, e.g., Ernest N. Jouriles et al., *Physical Violence and Other Forms of Marital Aggression: Links with Children’s Behavior Problems*, 10 J. FAM. PSYCHOL. 223 (1996); Gayla Margolin, *Effects of Domestic Violence on Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 57 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998). Not surprisingly, this has a ripple effect in classrooms across the country, extending beyond the children who witness the violence to their classmates. One recent study examined the extent of this impact and the results were striking: having even one child exposed to domestic violence in a classroom “significantly decrease[s] their peers’ reading and

ourselves when a random batterer's rage and need to control causes him to pursue his victim out in public, into her workplace, or someplace else where we just happen to be. Granted, information as to the precise scope of each such risk is probably more difficult to come by than is the case with passive smoking, but both studies of and actual experience with risk perception indicate that awareness of a particular risk is enough to change attitudes even if its exact dimensions are not known.¹⁷⁸ In the words of one scholar, "The concept of risk is a psychological one. Risk, as opposed to danger, is a socially constructed phenomenon."¹⁷⁹

The physical risk to third parties is not the only parallel between domestic violence and smoking; there is an economic costs parallel as well. A 2003 study conducted by the Centers for Disease Control estimated the costs of domestic violence to be in excess of \$5.8 billion annually.¹⁸⁰ Obviously, these costs are not borne entirely by batterers and victims; rather, all of us pay. As with the physical risks—and once again, as used to be the case with passive smoking—people simply do not have the information they need to understand the extent to which it is in their self-interest to get involved. Our point here is simply that just as information about the harmful effects of passive smoking motivated non-smokers to advocate for new laws and policies, if domestic violence bystanders understood what is at stake for them, they might be motivated to actively support new initiatives that would provide enough resources and other support to battered women.

Another possible answer to the challenge of changing our "other people's domestic violence is not my problem" norms comes from what is known as social norms theory. Social norms theory posits "that much of people's behavior is influenced by their perception of how other mem-

math test scores and significantly increase[s] misbehavior of others in the classroom." Scott E. Carrell & Mark L. Hoekstra, *Externalities in the Classroom: How Children Exposed to Domestic Violence Affect Everyone's Kids*, NBER Working Paper Series, Working Paper 14246, at 1 (2008), available at <http://ssrn.com/abstract=1231694>. Growing up around domestic violence can have serious longer-term effects as well. In one study, 70% of teens who grew up in homes with adult domestic violence self-reported violent conduct of their own as compared with 49% of those who grew up in families without such violence. See BARBARA E. SMITH ET AL., A.B.A. CTR. ON CHILDREN & THE LAW, *HELPING CHILDREN EXPOSED TO DOMESTIC VIOLENCE: LAW ENFORCEMENT AND COMMUNITY PARTNERSHIPS* 6–7 (2001), available at <http://www.abanet.org/child/dvchild.pdf>. Another group of researchers found that "boys exposed to violence committed by their father are ten times more likely than boys from nonviolent homes to use violence against an intimate partner in the future." *Id.* at 7.

¹⁷⁸ See Clinton M. Jenkin, *Risk Perception and Terrorism: Applying the Psychometric Paradigm*, 2 *HOMELAND SECURITY AFF.* 1, 1 (2006), available at <http://www.hsaj.org/?article=2.2.6> ("Riskiness is based on perception rather than fact, and this perception is based on qualitative, not quantitative characteristics of the hazard being considered.").

¹⁷⁹ *Id.*

¹⁸⁰ *COSTS OF INTIMATE PARTNER VIOLENCE*, *supra* note 13, at 2. According to the CDC, the bulk of the \$5.8 billion was for health care costs, but they also attempted to estimate the costs of lost productivity. *Id.*

bers of their social group behave.”¹⁸¹ As applied to the kinds of “detached third-party” noninvolvement norms that are of particular interest to us, social norms theory would posit that “whether someone intervenes is . . . influenced by the extent to which they feel that others in their immediate environment share their concerns and will support their efforts.”¹⁸² First used in campaigns to reduce drinking on college campuses, this approach has since been used to address a variety of other campus issues, ranging from sexual assault prevention to academic performance.¹⁸³ More importantly, for our purposes, as discussed below, it has also been used in campaigns aimed at changing norms associated with domestic violence.

One such effort was a joint project by the National Network on Violence Against Women and a South African multi-media health promotion and social change agency known as the Soul City Institute.¹⁸⁴ Conducted over a six-month period, the campaign used social norms marketing strategies to address South Africa’s domestic violence problem.¹⁸⁵ Another example is an ongoing project funded by the Family Violence Prevention Fund that attempts to change the attitudes of men about violence in relationships.¹⁸⁶ Recognizing that varying levels of intimate partner violence may be a norm in their lives, the program, called “Coaching Boys into Men,” is directed toward young boys.¹⁸⁷ It is founded on the belief that “[t]rue progress toward ending violence against women and children will only be achieved when a critical mass of men are actively involved in the solution by talking to the boys in their lives.”¹⁸⁸ The Fund reports that since 2000, when only 29% of men surveyed said that they had spoken to their sons about not using violence in their relationships, currently over 55% report such conversations.¹⁸⁹ Yet

¹⁸¹ NAT’L SOC. NORMS INST., THE MAIN FRAME: STRATEGIES FOR GENERATING SOCIAL NORMS NEWS 5 (2002), available at <http://www.socialnorms.org/pdf/themainframe.pdf>.

¹⁸² Alan D. Berkowitz, *Fostering Healthy Norms to Prevent Violence and Abuse: The Social Norms Approach*, in PREVENTING SEXUAL VIOLENCE AND EXPLOITATION: A PRACTITIONER’S SOURCEBOOK (Keith L. Kaufman ed., 2010) (manuscript at 3), available at <http://www.alanberkowitz.com/papers.php#2> (select “Fostering Healthy Norms to Prevent Violence and Abuse: The Social Norms Approach”).

¹⁸³ For information about the origins and some of the current uses of the social norms approach, see *Frequently Asked Questions*, NAT’L SOC. NORMS INST., <http://www.socialnorms.org/FAQ/FAQ.php> (last visited Aug. 23, 2010).

¹⁸⁴ The project and results are described in detail in S. Usdin et al., *Achieving Social Change on Gender-Based Violence: A Report on the Impact Evaluation of Soul City’s Fourth Series*, 61 SOC. SCI. & MED. 2434 (2005).

¹⁸⁵ *Id.* at 2435.

¹⁸⁶ See *Coaching Boys to Men Media Campaign*, FAMILY VIOLENCE PREVENTION FUND, http://www.endabuse.org/section/programs/public_communications/_coaching_boys (last visited Aug. 23, 2010).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

another ongoing effort is the University of New Hampshire's "Know Your Power Media Campaign" which encourages community and third-party involvement in preventing violence against women.¹⁹⁰ Although these programs and projects obviously vary in their particulars, the common thread running through all of them is that they direct their efforts at previously uninvolved community members and try to involve them in domestic violence work. In the words of social norms theory pioneer Alan D. Berkowitz, who has frequently voiced concerns akin to our own concern about over-reliance on the empowerment approach to domestic violence,—“Ending violence against women has always been seen as the province of women But seeing violence prevention as only the responsibility of women is an example of thinking that perpetuates the problem.”¹⁹¹

The Federal Centers for Disease Control and Prevention (CDC) takes a similar approach to domestic violence. It characterizes intimate partner violence as a community problem and has developed and funded programs designed to be a more comprehensive approach to dealing with domestic violence. The Domestic Violence Prevention Enhancement and Leadership Through Advancement (DELTA) program is an example of a CDC-funded effort to address the need for community and societal level change. The CDC identifies social norms marketing campaigns as a critical part of the strategy to “promote social norms, policies, and laws that support gender and economic equality and foster intimate partnerships based on mutual respect, equality, and trust.”

Researchers who have studied these programs have even reported some successes. One result from the Soul City campaign is especially notable given the social norms challenges that lie ahead here: a reported 18% increase in the number of people who rejected the view that domestic violence is “a private affair.”¹⁹² Scholars who study the efficacy of violence against women prevention programs have also written about the promise that these kinds of programs seem to hold.¹⁹³ We want to emphasize, however, that even if there were no evidence of short-term positive effects, we would nonetheless advocate the use of strategies aimed at getting the entire community to view the battle against domestic violence

¹⁹⁰ See generally KNOW YOUR POWER, <http://www.know-your-power.org/> (last visited Aug. 23, 2010).

¹⁹¹ *Domestic Violence Prevention Enhancement and Leadership Through Alliances* (DELTA), Ctrs. for Disease Control & Prevention, <http://www.cdc.gov/ncipc/DELTA/default.htm> (last visited Aug. 23, 2010).

¹⁹² Usdin et al., *supra* note 184, at 2440.

¹⁹³ See, e.g., Victoria L. Banyard et al., *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32 J. COMMUNITY PSYCHOL. 61 (2003); Berkowitz, *supra* note 182; Patricia M. Fabiano et al., *Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach*, 52 J. AM. C. HEALTH 105 (2003).

as their battle too. There simply is no other way to bring about the social and cultural changes that in our view are essential if we are going to turn the page on domestic violence.

CONCLUSION

Our current approach to domestic violence places too much emphasis on victim-initiated remedies in the name of empowering victims. Recent efforts to address other public health and social problems have gotten entire communities involved in matters that they previously viewed as not their concern. Whether through disseminating information about previously little-known costs, correcting misperceptions about what other people think, or some combination of these or similar strategies, the campaigns have resulted in remarkable changes in the public attitudes and conduct. Domestic violence not only deeply harms the immediate victim, it exacts a toll on all of us by imposing enormous economic costs while incubating troubled and sometimes vicious people as children witness and suffer from the violence at home. These are costs that could form the basis of a campaign that engages everyone in an effort to reduce tolerance for domestic violence. Spreading the word that many people actually disapprove of such violence and abuse could also be part of these campaigns to encourage people who now remain silent about their disapproval to speak out. As social norms change, so, too, will the law and the law's efficacy in reducing the amount of violence against women. The answer to the problem of domestic violence is not to empower a victim to procure a protection order and carry a concealed weapon to ensure enforcement. It is to recognize that the perils she faces are of concern to us all.